Victims' Rights Amendment: A Proposal to Amend the United States Constitution in the 108th Congress

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Summary

Thirty-three states have added a victims' rights amendment to their state constitutions. S.J.Res. 1/H.J.Res. 48/H.J.Res. 10 would add a victims' rights amendment to the United States Constitution. The amendment is identical to proposals offered in the 107th Congress (S.J.Res. 35/H.J.Res. 88/H.J.Res. 91) and has been endorsed by the President. Similar proposals date back to the 104th Congress.

The proposed amendment grants the victims of state and federal violent crimes the right:

- to reasonable and timely notice of public proceedings relating to the crime;
- to reasonable and timely notice of the release or escape of the accused;
- not to be excluded from such public proceedings;
- reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and
- to adjudicative decisions that give due consideration to victims' interests in their safety, in avoiding unreasonable delay and to consideration of their just and timely claims for restitution from the offender.

The rights may not be restricted except to the extent dictated by a substantial interest in public safety or the administration of criminal justice or by compelling necessity. Only victims and their representatives may enforce the rights, but they may not do so through a claim for damages or request to reopen a completed trial. Congress is otherwise empowered to enact legislation for the amendment's enforcement.

The proposed amendment is the product of efforts to reconcile victims' rights, the constitutional rights of defendants, and prosecutorial prerogatives. The hearings on current and past proposals and three Senate Judiciary Committee reports (S.Rept. 108-191; S.Rept. 105-409; S.Rept. 106-254) provide insight as to the intent of language used and proposed language implicitly rejected.

Proponents and their critics disagree over the need for the proposed Amendment, its meaning, its propriety, its costs, and its effect on federalism.

This report appears in abridged form under the title *Victims' Rights Amendment: A Sketch of a Proposal in the 108th Congress to Amend the United States Constitution*, CRS Report RS21434.

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Introduction

A victims' rights amendment to the United States Constitution has been introduced in three essentially identically worded resolutions in the 108th Congress: S.J.Res. 1, H.J.Res. 48, and H.J.Res. 10.[1] The Amendment is one which the President has endorsed both in this Congress and the 107th Congress.[2] Comparable provisions different in word if not in spirit were offered in earlier Congresses.[3] This is a brief discussion of the content of the Amendment and of some of the issues it raises.[4]

Text of the Proposed Amendment

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and

[1] S.J.Res. 1 and H.J.Res. 48 are identical. H.J.Res. 10 differs only in that S.J.Res. 1/H.J.Res. 48 places the provision for effective date of the amendment following ratification in section 5 and H.J.Res. 10 places it in the enacting clause. S.J.Res. 1(Sens. Kyl and Feinstein) and H.J.Res. 10 (Rep. Royce) were introduced on the first day of the session; H.J.Res. 48 (Rep. Chabot) on April 10, 2003.
This report refers to the resolutions collectively (and the identical resolutions in the 107th Congress) as the Amendment and to resolutions from earlier Congresses as either the proposal or the proposals. The particulars of any bills to establish greater victims' rights by statute, *e.g.*, S. 805 (108th Congress), are beyond the scope of this report.

[2] "I announce my support for the bipartisan Crime Victims' Rights amendment to the Constitution of the United States," President Bush, *President Calls for Crime Victims' Rights Amendment* (April 16, 2002), available at http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html; President Bush, National Crime Victims' Rights Week, 2003: A Proclamation, available at http://www.ojp.usdoj.gov/ovc/ncvrw/2003/bushproc.htm.

[3] See, in the 104th Congress: S.J.Res. 52, S.J.Res. 65, H.J.Res. 173, and H.J.Res. 174; A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing I), 104th Cong., 2d Sess. (1996) – in 105th Congress: S.J.Res. 6, S.J.Res. 44, H.J.Res. 71, and H.J.Res. 129; S.Rept. 105-409 (1998); Proposals to Provide Rights to Victims of Crime: Hearing Before the House Comm. on the Judiciary (House Hearing II), 105th Cong., 1st Sess. (1997); A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing II), 105th Cong., 1st Sess. (1997) – in the 106th Congress: S.J.Res. 3, and H.J.Res. 64; S.Rept. 106-254 (2000); A Proposed Constitutional Amendment to Protect Crime Victims: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing III), 106th Cong., 1st Sess. (1999), and H.J.Res. 64, Proposing An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Hearing Before the Subcommittee on the Constitution of the House Judiciary Comm., 106th Cong., 2d Sess. (2000) (House Hearing III), available at, http://www.house.gov/judiciary; – in the 107th Congress: S.J.Res. 35, H.J.Res. 88, and H.J.Res. 91; Federal Victims Rights Amendment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Cong., 2d Sess. (2002)(House Hearing IV), available at, http://www.house.gov/judiciary; S.J.Res. 35-The Crime Victims' Rights Amendment: Hearing Before the Subcomm. on Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 107th Cong., 2d Sess. (2002)(Senate Hearing IV), available at http://judiciary.senate.gov; and – in the 108th Congress: H.J.Res. 10, H.J.Res. 48, S.J.Res. 1; S.Rept. 108-191; Crime Victims Constitutional Amendment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 108th Cong., 1st Sess. (2003)(House Hearing V), available at, [http://www.house.gove/judiciary]; A Proposed Constitutional Amendment to Protect Crime Victims, S.J.Res. 1: Hearing Before the Senate Comm. on the Judiciary; 108th Cong., 1st Sess. (2003)(Senate Hearing V), available at http://judiciary.senate.gov. At this writing pagination for the Senate hearings during the 108th Congress is not yet available.

[4] For a more extensive background discussion see, *Victims' Rights Amendment: Background & Issues Associated With Proposals to Amend the United States Constitution*, CRS Report 97-735 (April 2000); for an analysis of proposals made during the 106th Congress see, *Victims' Rights Amendment: Proposals to Amend the United States Constitution in the 106th Congress*, CRS Report RL30525 (May 12, 2000).

purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States*, and which shall take effect on the 180th day after ratification of this article*:[5]

Article–

> SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.
>
> SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.
>
> SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.
>
> SECTION 4. The Congress shall have the power to enforce by appropriate legislation this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.
>
> SECTION 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress. *This article shall take effect on the 180th day after the date of its ratification.*[6]

Analysis

Purpose

Proponents of the Amendment have articulated five reasons for passage of the Amendment:

- a constitutional amendment will balance the scales of justice;
- a constitutional amendment will fix the patchwork of victims' rights laws;
- a constitutional amendment will restore rights that existed when the Constitution was written;
- a constitutional amendment is necessary because state law is insufficient; and
- a constitutional amendment is necessary because federal statutory law is insufficient, 149 *Cong.Rec.* S82-4 (daily ed. Jan. 7, 2003).

The Need for Greater Balance

> "The scales of Justice are imbalanced. The U.S. Constitution, mainly through amendments, grants those accused of crime many constitutional rights, such as a speedy trial, a jury trial,

[5] The language in italics at the end of the enacting clause is found only in H.J.Res. 10.

[6] This last italicized sentence appears only in S.J.Res. 1/H.J.Res. 48.

> counsel, the right against self-incrimination, the right to be free from unreasonable searches and seizures, the right to subpoena witnesses, the right to confront witnesses, and the right to due process under law.
>
> "The Constitution, however, guarantees no rights to crime victims. For example, victims have no right to be present, no right to be informed of hearings, no right to be heard at sentencing or at a parole hearing, no right to insist on reasonable conditions of release to protect the victim, no right to restitution, no right to challenge unending delays in the disposition of their case, and no right to be told if they might be in danger from release or escape of their attacker. This lack of rights for crime victims has caused many victims and their families to suffer twice, once at the hands of the criminal, and again at the hands of the justice system that fails to protect them. The Crime Victims' Rights Amendment would bring balance to the judicial system by giving victims of violent crime the rights to be informed, present, and heard at critical stages throughout their ordeal," 149 *Cong.Rec.* S82 (remarks of Sen. Kyl)(daily ed. Jan. 7, 2003).[7]

The balance argument is hardly new. Close to three quarters of a century ago, the Supreme Court observed that "[t]he law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. . . . But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[8]

The due process clauses and other defendants' rights components of the Constitution supplied the foundation for the defendant-focused jurisprudence of the 1950's and 1960's. It has also served as one of the early catalysts for the victims' rights movement. A call for greater constitutional protection of victims' rights seems a predictable feature of the belief that the criminal justice system must involve a greater balance between the rights of victim and those of the defendant.[9]

Some might suggest that victims already enjoy equal constitutional rights with the accused.[10] The victim who repels an unlawful assault with excessive force may find himself criminally charged. In that case, he is entitled to exactly the same constitutional rights as his attacker.[11]

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[7] *See also*, 149 *Cong.Rec.* S83 (remarks of Sen. Feinstein)(daily ed. Jan. 7, 2003) ("Currently, while criminal defendants have almost two dozen separate constitutional rights, fifteen of them provided by amendments to the U.S. Constitution, there is not a single word in the Constitution about crime victims. These rights trump the statutory and state constitutional rights of crime victims because the U.S. Constitution is the supreme law of the land. To level the playing field, crime victims need rights in the U.S. Constitution. In the event of a conflict between a victim's and a defendant's rights, the court will be able to balance those rights and determine which party has the most compelling argument").

[8] *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

[9] *House Hearing V* at 1-2 (statement of Rep. Chabot)("Currently, the U.S. Constitution is completely silent on victims' rights, while it speaks volumes as to the rights of the accused. Thus, the U.S. Constitution essentially serves as a trump card for those accused of committing crimes in order to keep victims from participating in their prosecution, or even just sitting in the courtroom during trial"); 149 *Cong.Rec.* S82 (daily ed. Jan. 7, 2003)(remarks of Sen. Kyl)("[S]tatutory and State constitutional provisions are always subservient to the Federal Constitution; so, in cases of conflict, the defendants' rights – which are already in the U.S. Constitution – will always prevail. Our amendment will correct this imbalance"); *see also*, *The Victims' Bill of Rights: Are Victims All Dressed Up With No Place to Go?* 8 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 251, 276 (1992); Young, *A Constitutional Amendment for Victims of Crime: A Victim's Perspective*, 34 WAYNE LAW REVIEW 51, 64-65 (1987).

[10] *Senate Hearing IV* at 65 (statement of Ms. Arwen Bird)("As survivors of crime who are also United States citizens, we benefit from the fundamental protections that are guaranteed through our state and federal constitutions. The federal Bill of Rights ensures certain protections for all citizens; this includes those who have been victimized by crime").

[11] *Cf.*, Carter, *When Victims Happen to Be Black*, 97 YALE LAW JOURNAL 420 (1988) (discussing the case of Bernhard Goetz charged with attempted murder and assault and ultimately convicted for possession of an unlicensed handgun following a subway confrontation with muggers); S.Rept. 108-191 at 70 (minority views of Sens. Leahy, Kennedy,

Moreover, many of the constitutional rights afforded the accused benefit the victim as well. They are designed to ensure that the guilty are convicted and that the innocent are not. The accused benefits when the innocent are not convicted; the victim benefits when the guilty are.[12]

The more common response to the balance argument, however, has been that the balance argument "represents a fundamental misunderstanding of the nature and purpose of individual constitutional rights."[13] In the same vein, one of the motives critics attribute to victims' rights advocates is a rejection of a basic premise of the American criminal justice system. They suggest victims believe the criminal justice process constitutes an unjustifiable waste of time in a procedure that should be reduced to identifying and then punishing suspects; they consider "suspect", "accused", "defendant", and "guilty" synonymous terms. No process is too quick; no punishment sufficiently severe; acquittals are an injustice.[14]

The Need for Uniformity

> "Eighteen states lack state constitutional victims' rights amendments. And the 32 existing state victims' rights amendments differ from each other. Also virtually every state has statutory protections for victims, but these vary considerably across the country. Only a

Kohl, Feingold, Schumer, and Durbin (minority views))("the concept of balance often makes little sense in the context of a criminal proceeding. It assumes that we can identify the victim at the outset of every case, but this may not be possible. In some cases–as where the defendant claims that she acted in self-defense–identifying the victim is what the trial is all about"); see also, S.Rept. 106-254, at 63 (minority views of Sens. Leahy, Kennedy, Kohl, and Feingold).

[12] Logic might suggest that the victim also suffers when the guilty escape unpunished because an innocent individual has been accused instead, but this view is rarely heard.

[13] *Senate Hearing IV* at 134-35(statement of Mr. Roger Pilon)("[P]ronents of this amendment often speak of a constitutional 'imbalance' between the rights of defendants and the rights of victims. The Constitution lists numerous rights of defendants, they say, but is silent regarding victims. There is a fundamental reason for that 'imbalance.' It has to do with the very purpose and structure of the Constitution. . . . The federal government had only those powers that the people, through the Constitution, had delegated to it, as enumerated in the document. And the exercise of that power was further restrained by the rights of the individual, enumerated and unenumerated alike. . . . [S]uch benefits as the Constitution does confer in the criminal law context arise entirely because the government is the moving party in an adversarial matter. The benefits or rights of due process or trial by jury, for example arise only because the government has placed the accused in an adversarial relationship, at which time such rights kick in to limit the means government may employ. The situation is entirely different with crime victims. They stand in no adversarial relationship with the government such that the means available to the government must be restrained for their protection"); *see also*, S.Rept. 108-191 at 70 (minority views) ("the balance argument mistakes the fundamental reason for elevating rights to the constitutional level. The rights enshrined in the United States Constitution are designed to protect politically weak and insular minorities against governmental overreaching or abuse, not to protect individuals from each other. When the government unleashes its prosecutorial power against an accused, the accused faces the specter of losing his liberty, property, or even his life. The few and limited rights of the accused in the Constitution are there precisely because it will often be unpopular to enforce them so that even when we are afraid of a rising tide of crime, we will be protected against our own impulse to take shortcuts that could sacrifice a fair trial of the accused and increase the risk of wrongful conviction. In contrast, there is no need to grant constitutional protections to a class of citizens that commands virtually universal sympathy and substantial political power. In the words of Bruce Fein . . . '[C]rime victims have no difficulty in making their voices heard in the corridors of power; they do not need protection from the majoritarian political process, in contrast to criminal defendants whose popularity characteristically ranks with of General William Tecumseh Sherman in Atlanta, Georgia'"); see also, S.Rept. 106-254 at 63-4 (minority views of Sens. Leahy, Kennedy, Kohl, and Feingold); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 357, 381 (1986); Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE LAW REVIEW 87, 91 (1987).

[14] *E.g.*, Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH LAW REVIEW 517; King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 UNIVERSITY OF CINCINNATI LAW REVIEW 357, 362 (2000).

> federal constitutional amendment can ensure a uniform national floor for victims' rights." 149 *Cong.Rec.* S83 (remarks of Sen. Feinstein)(daily ed. Jan. 7, 2003).[15]

Although seldom expressed, the concern is that the presence of many individual standards contributes to the failure of existing provisions. Diversity breeds uncertainty that leads to a failure to comply and a failure to claim.

Critics respond that a victims' rights amendment would essentially federalize the state criminal justice process, denying the people of a particular state and their elected officials the right to decide the range of victim rights and services that should be a part of their state criminal justice systems.[16]

Uniformity obviously requires compliance to a single standard imposed by an amendment to the United States Constitution. Some victims' advocates, however, see the Amendment as providing a constitutional minimum beyond which Congress and the states would remain free to establish more exacting victims' rights, hence the reference to a "uniform national floor."[17] Skeptics may find that this does not eliminate the patchwork; it simply changes it.[18]

Restoration of Victims' Historic Rights

> "It is a little know[n] fact that at the time the Constitution was drafted, it was standard practice for victims–not public prosecutors–to prosecute criminal cases. Because victims were parties to most criminal cases, they enjoyed the basic rights to notice, to be present, and be heard. Hence, it is not surprising that the Constitution does not mention victims.
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> "Now, of course, it is extremely rare for a victim to undertake a criminal prosecution. Thus, victims have none of the basic procedural rights they used to enjoy. Victims should receive

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[15] Thirty-three states have added victims' rights amendments of varying stripes to their state constitutions, ALA.CONST., Amend. 557; ALASKA CONST. art.I, §24; ARIZ.CONST. art.2, §2.1; CAL.CONST. art.I, §28; COLO.CONST. art.II, §16a; CONN. CONST. art.I, §8[b.]; FLA.CONST. art.I, §16(b); IDAHO CONST. art.I, §22; ILL. CONST. art.I, §8.1; IND.CONST. art.1, §13; LA.CONST. art.1, §25; KAN.CONST. art.15, §15; MD.D.OF RTS. art.47; MICH.CONST. art.I, §24; MISS. CONST. art. 3, §26A; MO.CONST. art.I, §32; MONT. CONST. Art.2, §28; NEB.CONST. Art.1, §28;
NEV.CONST. art.1, §8; N.J. CONST. art.I, §22; N.MEX. CONST. art.II, §24; N.C. CONST. art.I, §37; OHIO CONST. art.I, §10a; OKLA.CONST. art.II, §34; ORE. CONST. art. I, §24; R.I.CONST. art.I, §23; S.C.CONST. art.I, §24; TENN.CONST. art.I, §35; TEX.CONST. art.I, §30; UTAH CONST. art.I, §28; VA.CONST. art.I, §8-A; WASH.CONST. art.I, §35; WIS. CONST. art.I, §9m. (Perhaps because of its modesty, *i.e.*, it only guarantees restitution, the Montana constitutional amendment is frequently not counted among the state victims' rights amendments).
The remaining states and the federal government have enacted similarly individualistic general victims' rights statutes, 42 U.S.C. 10605 to 10607; ARK.CODE ANN. §§16-90-1101 to 16-90-1115; DEL.CODE ANN. tit.11 §§9401 to 9419; GA.CODE ANN. §§ 17-17-1 to 17-17-16; HAW.REV.STAT. §§801D-1 to 801D-7; IOWA CODE ANN. §§915.1 to 915.100; KY.REV.STAT.ANN. §§421.500 to 421.576; ME.REV.STAT.ANN. tit.17-A §§1171 to 1175; MASS.GEN.LAWS ANN. ch.258B §§1 to 13; MINN.STAT.ANN. §§611A.01 to 611A.90; N.H.REV.STAT.ANN. §21-M:8-k; N.Y.EXEC.LAW §§640 to 649; N.D.CENT.CODE §§12.1-34-01 to 12.1-34-05; PA.STAT.ANN. tit.18 §11.201; S.D.COD.LAWS ANN. §§23A-28C-1 to 23A-28C-6; VT.STAT.ANN. tit.13 §§5301 to 5321; W.VA.CODE §§61-11A-1 to 61-11A-8; WYO.STAT. §§1-40-201 to 1-40-210.
The states with constitutional amendments generally have comparable statutes, and virtually every jurisdiction has victims' rights accommodations scattered throughout its code.

[16] S.Rept. 105-409 at 48 (minority views of Sen. Thompson); *cf.*, *Senate Hearing II* at 87 (testimony of James E. Doyle, Wisconsin Attorney General).

[17] 149 *Cong.Rec.* S82 (remarks of Sen. Kyl)(daily ed. Jan. 7, 2003)("a federal amendment would establish a basic floor of crime victims' rights for all Americans, just as the federal Constitution provides for the accused").

[18] Mosteller & Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 NORTH CAROLINA LAW REVIEW 371, 377-81 (2000)(criticizing proposals in the 106th Congress).

> some of the modest notice and participation rights they enjoyed at the time that the Constitution was drafted," 149 *Cong.Rec.* S83 (remarks of Sen. Feinstein)(daily ed. Jan. 7, 2003).

Opponents suggest that the notice and participation rights enjoyed at the time the Constitution was drafted were modest indeed, a far cry from those of the proposal. In its infancy English criminal law incorporated many of the features of private justice: outlawry, blood feuds, private compensation,[19] and trial by battle,[20] to mention a few. Several of these had disappeared before colonization of the New World; others never really took hold here; still others, private criminal prosecutions among them, disappeared over time. Although the laws of the several American colonies were not nearly as homogenous regardless of time or place as we may often believe, it seems clear that well before the founding of the Republic criminal prosecutions were almost always conducted by a public official.[21] United States Attorneys or their predecessors, United

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[19] "On the eve of the Norman Conquest what we may call the criminal law of England (but it was also the law of torts or civil wrongs) contained four elements which deserve attention; its past history had in the main consisted of the varying relations between them. We have to speak of outlawry, of the blood-feud, of the tariffs of *wer* and *bot* and *wite*, of punishment in life and limb . . . . [T]he evidence which comes to us from England and elsewhere invites us to think of a time when law was weak, and its weakness was displayed by a ready recourse to outlawry. It could not measure its blows; he who defied it was outside its sphere; he was outlaw. He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a friendless man, he is a wolf. . . .

"Without actively going to war with the offender, the law may leave him unprotected against those who have suffered by his misdeed; it may concede to them the right to revenge themselves. The slaughter of a member of one by a member of another kin has been the sign for a blood-feud. The injured kin would avenge its wrong not merely on the person of the slayer, but on his belongings. It would have life or lives for life, for all lives were not of equal value; six ceorls must perish to balance the death of one then. . . .

"Outlawry and blood-feud alike have been retiring before a system of pecuniary compositions, of bot: that is, of betterment. From the very beginning, if such a phrase be permissible, some small offences could be paid for; they were emendable. The offender could buy back the peace that he had broken. To do this he had to settle not only with the injured person but also with the king: he must make bot to the injured and pay a wite to the king. A complicated tariff was elaborated. Every kind of blow or wound given to every kind of person had its price, and much of the jurisprudence of the time must have consisted of a knowledge of these pre-appointed prices. Gradually more and more offences became emendable; outlawry remained for those would not or could not pay," II POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 449-51 (2d ed. 1898).

[20] "Since the Norman Conquest there have been three modes of trial in criminal cases, namely, trial by ordeal, trial by battle, and trial by jury; and there have been also three modes of accusation, namely, appeal or accusation by a private person, indictment or accusation by a grand jury, and informations which are accusations either by the Attorney-General or by the Master of the Crown Office," I STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 244 (1883).

[21] *Senate Hearing IV* at 2 (statement of Sen. Feingold)("I think it is fairly well established that public prosecutions were the norm when the Constitution was written and adopted"). As the Wickersham Commission observed, "[I]n the first years of the eighteenth century, the Colonies began to do away with private prosecutions and set public prosecutors. The first statute was enacted in Connecticut in 1704 . . . . [T]he example of Connecticut was soon followed in other Colonies. . . .By the end of the century, official prosecutions by public prosecutors had become established as the American system," NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT: REPORT ON PROSECUTION 6-7 (1931); *see also*, S.Rept. 108-191 at 68 ("Most American colonies followed the English model of private prosecutions in the 17th century but, as one distinguished scholar has written, that system 'proved even more poorly suited to the needs of the new society than to the older one.' These colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive'"); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 357, 371 (1986)("Whatever its derivation, the American system of public prosecution was fairly well established by the time of the American Revolution. This meant that local district attorneys were given a virtual monopoly over the power to prosecute. Crime victims were no longer allowed to manage and control the prosecution of their crimes; rather, the victim was to serve as a piece of evidence to be used by the state to obtain a conviction").

States District Attorneys, have prosecuted federal crimes from the beginning, 1 Stat. 92 (1789). Private prosecutions were permitted in some states, but even in such places they appear to have been unusual.[22]

Moreover, private prosecution brought with it but a meager portion of the rights today associated with victims' rights. A victim might hire a private prosecutor and might expect notice of the proceedings and their outcome as well as presentation of his views. Yet there has been no suggestion that the practice gave the victim an enforceable right to be present or to be heard other than through his or her attorney.

Inadequacy of State Law Alternatives

> "These state [victims' rights] measures have helped protect crime victims; but they are inadequate for two reasons. First, each amendment is different, and not all states have provided protection to victims. . . . Second, statutory and state constitutional provisions are always subservient to the federal constitution; so, in cases of conflict, the defendants' rights, which are already in the U.S. Constitution will always prevail." 149 *Cong.Rec.* S82 (remarks of Sen. Kyl) (daily ed. Jan. 7, 2003).[23]

The adequacy of alternatives, now and in the future, lies at the heart of the dispute. Proponents find present law wanting.[24] Opponents find present law workable and fear an amendment would make matters worse.[25] The specifics of the proposal provide the specifics for much of the debate. The more robust the amendment, the more civil libertarians and the states are likely to object; the

[22] The most commonly cited examples of private prosecutions involve dicta in appellate decisions and a few statutory provisions which allowed individuals to hire private attorneys to assist public officials in a public prosecution under some circumstances, *e.g.*, McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AMERICAN CRIMINAL LAW REVIEW 649, 665 n.78 (1976).

[23] See also, 149 *Cong.Rec.* S83 (daily ed. Jan. 7, 2003)("State victims' rights laws lacking the force of federal constitutional law are often given short shrift. A Justice Department-sponsored study and other studies have found that, even in states with strong legal protections for victims' rights, many victims are denied those rights. The studies have also found that statutes are insufficient to guarantee victims' rights. Only a federal constitutional amendment can ensure that crime victims receive the rights they are due").

[24] *House Hearing III* (statement of Rep. Chabot)("You might then ask why a constitutional amendment is necessary? The answer is simple: a clear pattern has emerged in courthouses around the country that judges and prosecutors are reluctant to apply or enforce existing laws when they are routinely challenged by criminal defendants"); *House Hearing IV* at 41 (statement of Roberta Roper, National Victims' Constitutional Amendment Network)("And while great progress has been made in the passage of good laws, both on the state and federal level and constitutional amendments passed in 33 states, the sad reality is that victims' rights continue to be denied. None of these state or federal laws are able to match the constitutionally protected rights of offenders. The result is that crime victims remain second class citizens in our nation's system of justice"); *see also*, Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE LAW REVIEW 51, 52 (1987); *The Victims' Bill of Rights: Are Victims All Dressed Up With No Place to Go?* 8 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 251, 273-74 (1992); Kyl & Feinstein, *Victims' Rights: Do We Need a Constitutional Amendment to Ensure Fair Treatment—Yes: Victims Deserve Justice No Less Than Defendants*, 82 AMERICAN BAR ASSOCIATION JOURNAL 82 (Oct. 1996); *Senate Hearing II* at 12 (statement of Prof. Laurence H. Tribe, Harvard University Law School); United States Department of Justice, Office of Justice Programs, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 11 (1998)("In the mid-1990s, the National Victim Center, under a grant from the National Institute of Justice, studied implementation of victim rights laws in four states. Two states were selected because they had strong state statutory and constitutional protection of victims' rights, and two were selected because they had weaker protection. The study surveyed more than 1,300 crime victims and was the largest of its kind ever conducted. It found that many victims were still being denied their rights, even in states with strong legal protection").

[25] *House Hearing II* at 143-45 (statement of Ellen Greenless, President National Legal Aid and Defender Association); *Senate Hearing II* at 99 (statement of Robert J. Humphreys, President of the Virginia Association of Commonwealth's Attorneys); *Senate Hearing II* at 162-63 (statement of the National Clearinghouse for the Defense of Battered Women).

more restrained the amendment, the more victims' rights advocates are likely to question its sufficiency.

Inadequacy of Federal Statutory Alternatives

> "The leading statutory alternative to the Victims' Rights Amendment would only directly cover certain violent crimes prosecuted in Federal court. Thus, it would slight more than 99 percent of victims of violent crime. We should acknowledge that Federal statutes have been tried and found wanting. It is time for us to amend the U.S. Constitution.
>
> "The Oklahoma City bombing case offers another reason why we need a constitutional amendment. This case shows how even the strongest Federal statute is too weak to protect victims in the face of a defendant's constitutional rights. In that case, two Federal victims' statutes were not enough to give victims of the bombing a clear right to watch the trial and still testify at the sentencing–even though one of the statutes was passed with the specific purpose of allowing the victims to do just that," 149 *Cong.Rec.* S84 (remarks of Sen. Feinstein)(daily ed. Jan. 7, 2003).[26]

Existing federal law enjoins federal officials to make "their best efforts" to ensure that crime victims are accorded:

1. The right to be treated with fairness and with respect for the victim's dignity and privacy.
2. The right to be reasonably protected from the accused offender.
3. The right to be notified of court proceedings.
4. The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
5. The right to confer with attorney for the Government in the case.
6. The right to restitution.
7. The right to information about the conviction, sentencing, imprisonment, and release of the offender. 42 U.S.C. 10606(b).

Section 10606, however, "does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim [these] rights," 42 U.S.C. 10606(c).

In other victim related provisions, federal law establishes public safety and the safety of any individual (including victims) as required considerations before bail is granted, 18 U.S.C. 3142(b). It no longer bars victims from federal criminal proceedings simply because they are potential witnesses, 18 U.S.C. 3510, but their attendance may bar them from testifying at any subsequent sentencing proceedings as witnesses.[27] It entitles victims of federal property crimes and crimes of violence to restitution, 18 U.S.C. 3663A, and to present a statement to the court before sentence is imposed, F.R.Crim.P. 32(c)(3)(E).

[26] *House Hearing IV* at 6 (statement of Rep. Royce) ("So while many states and the federal government have enacted legal protections for crime victims, those laws have been insufficient in providing all victims' rights within the criminal justice system"); *id.* at 80 (prepared statement of Sen. Kyl)("Attempts to establish rights by federal or state statute, or even state constitutional amendment, have proven inadequate, after more than twenty years of trying").

[27] *United States v. McVeigh*, 958 F.Supp.2d 512, 514-15 (D.Colo. 1997).

Overview

The Amendment is more succinct by design than its predecessors.[28] As a consequence it offers a wider range of interpretative choices. In general terms, it defines the participation of crime victims in state and federal official proceedings generated by the crimes committed against them. It gives them qualified notification, attendance, articulation, and consideration rights. Official decisions must take victims' safety and their interests in avoiding delay and in restitution into account. Victims have a right to be heard on questions of bail, plea agreements, sentencing, and pardons. They have a right to be informed of, and not excluded from, crime-related public proceedings and to be notified of escapes and releases. Congress enjoys legislative authority to enforce the Amendment, but may restrict victims' rights only in the name of public safety, the administration of criminal justice, or compelling necessity.

Preemptive and Amending Impact

The United States Constitution is the supreme law of the land, U.S.Const. Art. VI, cl.2. When it is said that nothing in victims' rights edicts created by statute or state constitution imperils defendants' rights under the United States Constitution, that is correct; nothing could. But an amendment to the United States Constitution stands on different footing. It amends the Constitution. Its very purpose is to make constitutional that which would otherwise not have been.[29] It may subordinate defendants' rights to victims' rights or subordinate victims' to defendants' rights. It may subordinate either, both, or neither to prosecutorial discretion. It may require any conflicting law or constitutional precept, state or federal, to yield. Even in the absence of a conflict, it may preempt the field, sweeping away all laws, ordinances, precedents, and decisions – compatible and incompatible alike – on any matter touching upon the same subject. Whether it does so or to what extent it does so is a matter of interpretation. That is, what is its intent? What does it say? What is its purpose? What does its history tell us?

The questions are most perplexing when an apparent conflict exists between state and federal law or among the rights and prerogatives of victims, defendants and prosecutors. The interpretative principles of preemption triggered by an apparent conflict between state and federal law are fairly well developed. "[P]reemption of state law [may occur] either by express provision, by implication, or by a conflict between federal and state law. And yet, despite the variety of these opportunities for federal preeminence, [the Court has] never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, [the Court has] worked on the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[30] Conversely, by virtue of the Supremacy Clause, where the subject matter is one which the Constitution relegates

[28] 149 *Cong.Rec.* S82 (remarks of Sen. Kyl)(daily ed. Jan. 7, 2003). The Amendment may have become more stylish at a cost, see, *Senate Hearing IV* at 123; *House Hearing* IV at 51 (statement of James Orenstein)("while the language of the current bill is more streamlined and reads more like other constitutional amendments than its predecessor, it achieves such stylistic improvements at the expense of clarity, which could result in real harm to criminal prosecutions").

[29] S.Rept. 105-409 at 67 (minority views of Sens. Leahy, Kennedy, and Kohl)(quoting former Deputy Attorney General Philip Heymann)("If it is not intended to free the States and Federal Government from restrictions found in the Bill of Rights – which would be a reckless tampering with provisions that have served us very well for more than 200 years – it is unclear what purpose the amendment serves").

[30] *New York Conference of Blue Cross v. Travelers Insurance Co.*, 514 U.S. 645, 654-55 (1995).

to the federal domain, the vitality of state law is dependent upon the largess of Congress and the Constitution.[31]

A victims' rights amendment to the United States Constitution that relegates the area to the federal domain, confines state authority to that which the amendment permits or allows Congress to permit. Few advocates have explicitly called for a "king-of-the-hill" victims' rights amendment, but the thought seems imbedded in the complaint that existing law lacks uniformity. How else can universal symmetry be accomplished but by implementation of a single standard that fills in where pre-existing law comes up short and shaves off where its generosity exceeds the standard? Yet the recent history of the Amendment and proposals indicate that advocates intended to establish a minimum rather than a uniform standard.[32]

Questions of the Amendment's impact on the rights afforded the accused may be even more difficult to discern. The principles of construction called into play in the case of a conflict between a victims' rights amendment and rights established elsewhere in the Constitution are similar to those used to resolve federal-state conflicts.

Intent of the drafters is considered paramount, but the courts will make every effort to reconcile apparent conflicts between constitutional provisions.[33] In the case of unavoidable conflict between provisions of equal dignity, the latest in time prevails.[34] If there is an unavoidable conflict between a right granted by an adopted victims' rights amendment and some other portion of the Constitution, the most recently adopted provision will prevail. As discussed below, proposals in the 106th Congress came to naught over the issue of defendants' versus victims' rights.[35]

Victims' Rights v. Defendants' Rights

Defendants' rights and prosecutors' prerogatives have been the twin Achilles' heels[36] of past victims' rights proposals. The challenge has been to strike a balance between the rights of victims

[31] *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-802 (1995).

[32] The sponsors of the Amendment in the Senate, both refer to it as establishing "a floor," 149 *Cong.Rec.* S82 (remarks of Sen. Kyl)(daily ed. Jan. 7, 2003); *id.* at S83 (remarks of Sen. Feinstein); the committee reports both most recent and in the past express a similar view, S.Rept. 108-191, at 32 ("[M]any states have already extended rights to victims of such offenses and the amendment in no way restricts such rights. In other words, the amendment sets a national 'floor' for the protection of victims' rights, not any sort of 'ceiling'"); *see also*, S.Rept. 106-254 at 29; S.Rept. 105-409 at 24; *Senate Hearing* V (statement of Assistant Attorney General Viet D. Dinh ("The proposed amendment respects the role of State and local governments because it does not bar them from providing additional or broader rights to victims. Instead, it provides a floor rather than a ceiling of the rights to be afforded to victims of crime"); but see, *House Hearing V* at 2 (statement of Rep. Chabot)("Only an amendment to the Constitution can establish uniformity in the criminal justice system and ensure victims receive the justice they deserve").

[33] *Cf., Vimar Seguros Y Reasdeguros v. Sky Reefer*, 515 U.S. 528, 533 (1995).

[34] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

[35] "This issue goes down–let me be very candid–on one phrase. That one phrase is the addition of language that would say nothing in this Constitution would abridge the right of a defendant as provided by this Constitution.
"That is a paraphrase of what it is.
"The Department of Justice insists on that language. We will not get administration support, I believe, without that language. The victims movement believes they would not have sufficient standing in these rights to really assert them in a meaningful way unless they were able to be balanced against the rights of the defendant," 146 *Cong.Rec.* S2977 (daily ed. April 17, 2000)(remarks of Sen. Feinstein).

[36] In Greek mythology, Achilles' mother sought to make her infant son immortal by holding him by the heels and dipping him in the River Styx. Achilles perished during the siege of Troy when Paris' arrow found Achilles' only vulnerable spot, the heel which his mother's hold had shielded from the immortalizing bath , *Achilles*, 1 ENCYCLOPEDIA

and defendants without impinging on defendants' rights or hamstring law enforcement efforts; to deny defendants' rights trump status without denying the defendants their rights or jeopardizing prosecutorial prerogatives.

Contemporary Practices

The victims' rights amendments in a few state constitutions concede that they may not be construed to diminish the rights of the accused.[37] Most rights that the United States Constitution guarantees the accused are binding on the states[38] and thus beyond limitation by state constitutional amendment in any event.

Past Practices

Until the Amendment in its present form first appeared in the 107th Congress, none of the proposals addressed the resolution of conflicts between the constitutional rights of defendants and the rights created in the Amendment. During Senate Judiciary Committee consideration of a proposal in the 108th and 106th Congresses, a modification was offered and defeated that would have provided that, "Nothing in this article shall limit any right of the accused which may be provided by this Constitution," S.Rept. 108-191, at 44; S.Rept. 106-254 at 43.

Amendment in the 108th Congress

> *Section 1: The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.*

Past proposals contained no mention of the rights of the accused. Consistent with the past, this preamble may represent no more than the announcement of an article of faith. If so, in cases of unavoidable conflict the rights of the victim being later in time would always trump the rights of the accused. Alternatively, it may limit the rights protected by the Amendment to those that do not intrude upon the rights of the accused, that is, in cases of unavoidable conflict the rights of the accused would always trump the rights of the victim. Which reading, if either, is correct? The Amendment's remaining text offers few clues.

The style is reminiscent of the Second Amendment,[39] but the similarities are not instructive. The Supreme Court has rarely construed the Second Amendment. Moreover the relationship between preambletory clause and the substance of the section are not the same. The Second Amendment states that the right to bear arms may not be infringed because a well regulated militia is necessary to the security of a free state. The Amendment states that victims' rights are established

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AMERICANA 103 (2001 ed.).

[37] *E.g.*, ALA.CONST., Amend. 557 ("to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime"); *see also*, FLA.CONST. art.I, §16(b); IND.CONST. art.1, §13; OHIO CONST. art.I, §10a; ORE. CONST. art. I, §24; VA.CONST. art.I, §8-A; WIS. CONST. art.I, §9m.

[38] *E.g.*, *In re Oliver*, 333 U.S. 257 (1948)(public trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967)(speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968)(jury trial); *Irvin v. Dowd*, 366 U.S. 717 (1961)(impartial jury); *Pointer v. Texas*, 380 U.S. 400 (1968)(confrontation); *Powell v. Alabama*, 287 U.S. 45 (1932)(right to counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963)(indigent's right to appointed counsel); *Benton v. Maryland*, 395 U.S. 784 (1969)(double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964)(self-incrimination); *In re Winship*, 397 U.S. 358 (1970)(proof beyond a reasonable doubt); *Furman v. Georgia*, 408 U.S. 238 (1972)(cruel and unusual punishment); *Kentucky v. Stincer*, 482 U.S. 730 (1987)(present at all critical stages of proceedings).

[39] "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed," U.S.Const. Amend. II.

and may not be denied because they need not conflict with the rights of the accused. The Second Amendment speaks of a rationale; the Amendment of an assurance of compatibility.

The statement of Professor Tribe, who helped draft the Amendment, seems to favor an accused-rights-or-prosecutor's-discretion-trumps-victims-rights solution: "How best to protect that right [of victims] without compromising either the fundamental rights of the accused or the important prerogatives of the prosecution is not always a simple matter, but I think your final working draft of April 13, 2002 resolves that problem in a thoughtful and sensitive way . . . That you achieved such conciseness while fully protecting defendant's rights and accommodating the legitimate concerns that have been voiced about prosecutorial power and presidential authority is no mean feat," 149 *Cong.Rec.* S85 (daily ed. Jan. 7, 2003)(letter from Laurence H. Tribe to Senators Dianne Feinstein and Jon Kyl). Victims' rights appear to come in third, if the object was to protect victims' rights without compromising prosecutorial prerogatives or the rights of the accused. But this is the status quo from the perspective of the Amendment's sponsors; it is what the Amendment seeks to change. It is a construction seemingly at odds with the purpose for the Amendment.

On the other hand, hearing witnesses offered explanations echoed in the Committee report under which prosecutorial prerogatives appear to come in a distant third:

> This preamble, authored by Professor Tribe, establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to *deny* constitutional rights to either the victim or the accused. *Senate Hearing V*; *House Hearing V* at 26 (statement of Steven T. Twist)(emphasis in the original).[40]

This may be why the restriction clause in section 2 of the Amendment[41] is said to imposes a less demanding standard for law enforcement exceptions than for defendants' rights exceptions.[42]

Victims of Crime

The Amendment creates rights for the victims of violent crime. Its scope turns on the definition of victim, on the definition of violent crime, and on the jurisdiction whose proceedings and

[40] *See also, id.* at 77 (statement of James Orenstein)("Much of the language adopted in S.J.Res. 3 to address law enforcement concerns has been changed or deleted in the current version. . . . Thus, for example . . . the remedies provision of the current bill no longer contains an explicit prohibition – as the previous version of the Amendment did – forbidding a court from curing a violation of a victim's participatory rights by staying or continuing a trial, reopening a proceeding or invalidating a ruling. If the current version of the Amendment is ratified, courts interpreting it might rule that this was a deliberate change and that any ambiguity on the issue must therefore be resolved in favor of allowing such remedies – remedies that could well harm the prosecution's efforts to convict an offender"); S.Rept. 108-191, at 30 ("This preamble establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not, in fact, deny those rights. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to deny constitutional rights to either the victim or the accused."). Note that section 2's restrictions in the name of public safety, the administration of criminal justice, and compelling necessities afford the prosecution some shelter from the assertion of victims' rights.

[41] "These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

[42] S.Rept. 108-191 at 41-2 ("The Committee-reported amendment provides that restrictions are permitted for a 'substantial interest' in public safety or the administration of criminal justice. In choosing this standard . . . the Committee seeks to provide adequate procedures for law enforcement and the courts while ensuring that the restriction does not swallow the rights. . . . In all other contexts only a 'compelling' interest . . . will operate to limit the right. The Committee stresses that defendants' constitutional rights may well mee+t this standard in many cases").

decisions the Amendment governs. The Amendment's authors apparently contemplate basic coverage of individuals and legal entities victimized by any crime that in its nature or the circumstances of its commission involves the use or threatened use of physical force against the person or property of another, S.Rept. 108-191, at 30-2. In addition, they seem to anticipate that Congress and the states may directly expand this basic coverage for the benefit of victims of certain nonviolent crimes and indirectly expand it by the conduct they subsequent decide to outlaw or legalize, *id.* The Amendment in section 2 seems to concede continuing legislative authority – at least for Congress and perhaps for the states – to curtail this basic coverage "where and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

On its face the Amendment would appear to apply with respect to proceedings involving a crime – federal, state, territorial or tribal; civilian or military – but probably not with respect to juvenile proceedings under any of those authorities.

Contemporary Practices

Who is a Victim

In common parlance, the concept of victim is fairly broad. It encompasses the sympathetic and not so sympathetic victim – the rape victim and the "ripped off" drug dealer; the casualties of gang warfare, both bystander and participant; the middleman in a pyramid scheme;[43] the defendant who is acquitted or whose conviction is overturned;[44] and the elderly person defrauded the savings of a lifetime.

The term often contemplates parents and other members of the family of a deceased, incapacitated, or juvenile victim. In the case of property crimes, it may include anyone with an interest in the property, *e.g.*, an owner, a tenant, a mortgage holder, or an insurer. In a commercial setting, it embodies those who are economically disadvantaged by a crime even if they suffered no direct injury to an identifiable property interest. In the case of civil rights violations, hate crimes, and terrorism, any member of the group targeted for intimidation may correctly be counted a victim. In the case of public solicitation for prostitution, public drug trafficking, and other crimes with elements of environmental nuisance, anyone who lives in, does business in, or has occasion to visit any affected geographical area might be listed among the victims.[45] The various "Megan's Law" efforts seem to suggest that at least in the public mind, the concept of victim also may encompass potential victims under some circumstances.[46] The governmental

[43] A scheme involving an enterprise whose only income generating activity is the solicitation of successive layers of investors, each layer paid out of the investments of their successors, *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 475 (6th Cir. 1999).

[44] *E.g.*, Dr. Sam Sheppard's conviction for the murder of his wife was only overturned after he had served ten years in prison, *Shepard v. Maxwell*, 384 U.S. 333 (1966); DNA and other evidence, strongly corroborating his innocence, was only fully developed after his death, *Pittsburgh Post-Gazette*, A8 (March 30, 1997).
House Hearing II at 90 (statement of Elisabeth A. Semel on behalf of the National Association of Criminal Defense Lawyers)("Just last week, three men were released from Illinois' death row, having spent 18 years in prison for a double murder they did not commit. As one of the men, Kenneth Adams, rightly said: 'We are victims of this crime too . . . I want people to know that this could happen to anybody and that's a crime'").

[45] *Community Input at Sentencing: Victim's Right or Victim's Revenge?* 75 BOSTON UNIVERSITY LAW REVIEW 187 (1995).

[46] See also, Abrahamson, *Redefining Roles: The Victims Rights Movement*, 1985 UTAH LAW REVIEW 517, 526 ("The victim has become middle class America. We are all potential victims. Beginning in the 1960s, there has been an increase of crime – or at least a perception of an increase of crime. More and more people began to see themselves and

entities that must bear the cost of investigating and prosecuting crime could legitimately be considered its victims. Finally, the concept of criminal law is based upon the premise that a criminal act is a transgression against the social order, against the commonweal, the body politic; a crime is a wrong committed against all of us.

Most state constitutional amendments do not define the classes of crime victims for whom they establish rights.[47] Statutory definitions are diverse and more than a few jurisdictions recognize different definitions for different purposes. The corporate victim of a crime, for example, may be entitled to restitution but not to notice of the release of an offender.[48] Under some victims' rights statutes, "victims" may be limited to the victims of felonies or of specific violent crimes.[49] In several instances, states have modified their definitions of "victim" to exclude certain classes of victims, *e.g.*, prisoners, codefendants, and the like.[50]

Rights in What System

The question of what constitutes a "crime" for purposes of victims' rights is one of several parts. What type of crimes does it cover? Does the Amendment cover state as well as federal crimes? Does it cover crimes proscribed by the laws of the District of Columbia, or of Puerto Rico, or of any of the other territories or possessions of the United States?[51] Does the Amendment exempt certain victims either because of the character of the victim (e.g., corporate entity, criminally accused) or the status of the accused (e.g., a juvenile, a Native American, or a member of the armed forces)? In most jurisdictions, conduct that would be considered criminal in an adult is considered delinquency (not criminal conduct) in a juvenile unless the juvenile is tried as an adult. The states are divided over whether the victims of acts of juvenile delinquency are entitled to the same level of rights as the victims of the same misconduct when committed by an adult.[52]

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their family members as victims of crime or as potential victims").

[47] The majority create rights for victims "as defined by law", *e.g.*, ALA.CONST. Amend.No. 557; CONN.CONST. Art.1, §8[b], *but see*, N.J.CONST. Art.1, ¶22; N.MEX.CONST. Art.II, §24.

[48] *E.g.*, MINN.STAT.ANN. §611A.01("'Victim' means a natural person who incurs loss or harm as a result of a crime . . . and for purposes of [restitution] also includes a corporation that incurs loss or harm as a result of crime . . .").

[49] *E.g.*, W.VA.CODE §61-11A-2 ("'victim' means a person who is a victim of a felony"); S.D.COD.LAWS ANN. §23A-28C-4 ("victim means any person being the direct subject of . . . a crime of violence, simple assault [in a domestic context, or drunk driving]"); KY.REV.STAT.ANN. §421.500 ("'victim' means an individual who suffers . . . harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance . . .").

[50] *E.g.*, ILL.COMP.LAWS ANN. ch. 725, §130/3; IND.CODE ANN. §35-40-4-8.

[51] This question is especially intriguing with respect to those places where the full panoply of defendant's constitutional rights may not be available, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990)("the global view taken by the Court of Appeals to the application of the Constitution is also contrary to this Court's decisions in the *Insular Cases*, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. In *Dorr*, we declared the general rule that in an unincorporated territory–one not clearly destined for statehood–Congress was not required to adopt a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated. Only 'fundamental' constitutional rights are guaranteed to inhabitants of those territories").

[52] United States Department of Justice, Office of Justice Programs, Office for Victims of Crime, *New Direction From the Field: Victims' Rights and Services for the 21st Century* at 22 ("Although some state victims' bill of rights and constitutional amendments include rights for victims of juvenile offenders, most states have extended only selected rights to these victims"). Only three of the thirty-three state constitutional amendments expressly cover victims of juvenile misconduct, ALASKA CONST. Art.1, §24; ORE.CONST. Art.I, §42; S.C.CONST. Art.I, §24; two others empower their state legislatures to do so, ARIZ.CONST. Art.2, §2.1; UTAH CONST. Art.1, §28(3).

Past Proposals

Who is a Victim

The drafters of past victims' rights proposals have opted for one of three alternatives: (1) crimes of violence;[53] (2) felonies and crimes of violence;[54] (3) crimes of violence and such other crimes as were legislatively designated.[55] The vast majority have created rights for the victims of both state and federal crimes:[56]

> *A victim of a crime of violence, as these terms may be defined by law, shall have the rights to* . . . S.J.Res. 3 (106th Cong.)
>
> *Each individual who is a victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence shall the rights to* . . . H.J.Res. 64 (106th Cong.).

Section 3 of some of the older proposals declared that "no person accused of the crime may obtain any form of relief hereunder." This obviously referred to those who victimize, but it might have disqualify victims who were also accused of a crime. For example, if both parties to a domestic altercation were charged, neither might be considered qualified. Alternatively, they might each be considered the victim of the other's crime, and thus both be entitled to the Amendment's benefits. The language ("*the* crime") probably could not be reasonably construed to bar claims by those under indictment or other form of criminal charge for other crimes. Thus, for instance, inmates who are the victims of criminal assaults while incarcerated would appear to qualify as victims under the proposal.[57]

Rights in What System

All but one of the early proposals included juvenile proceedings;[58] some covered military prosecutions without reservation;[59] some contained explicit reference to habeas proceedings;[60]

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[53] S.J.Res. 3 (106th Cong.) ("a victim of a crime of violence as these terms may be defined by law"); S.J.Res. 44 (105th Cong.) ("a victim of a crime of violence"); H.J.Res. 129 (105th Cong.)(same).

[54] H.J.Res. 64 (106th Cong.)("victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence"); H.J.Res. 71 (105th Cong.)(same); H.J.Res. 173 (104th Cong.)(substantively the same).

[55] S.J.Res. 6 (105th Cong.)("victim of a crime of violence, and other crimes that Congress may define by law"); S.J.Res. 52 (104th Cong.)("victim . . . of a crime of violence and other crimes as may be defined by [state or federal] law"); H.J.Res. 174 (104th Cong.)(same).

[56] H.J.Res. 129 (105th Cong.) appears to be the only exception.

[57] Cf., *Senate Hearing V*; *House Hearing V* at 76(statement of James Orenstein)("If, as discussed below, the current language of the Amendment creates a right to be present in court proceedings involving the crime, or at a minimum to be heard orally at some such proceedings, prison administrators will be faced with the Hobson's choice between cost- and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses within prison walls that are necessary to maintain order. Either choice could undermine orderly prison administration and the safety of corrections officers"); see also, *Senate Hearing IV* at 118; *House Hearing IV* at 48.

[58] H.J.Res. 173 (104th Cong.)(". . . victims . . . in each *prosecution* by the United States or a State. . .")(emphasis added).

[59] H.J.Res. 173 (104th Cong.)(". . . victims . . . in each prosecution by the United States or a State. . ."); H.J.Res. 174/S.J.Res. 52 (104th Cong.)("To ensure that the victim is treated with fairness. . . throughout the criminal, military, and juvenile justice processes. . .").

[60] H.J.Res. 71 (105th Cong.); S.J.Res. 6 (105th Cong.).

several lacked any explicit reference to the territorial courts;[61] and one applied only to federal proceedings.[62]

In the 106th Congress, the proposals reached state, federal, and territorial proceedings; juvenile proceedings; and, to the extent permitted by Congress, military proceedings. In doing so, the Senate Judiciary Committee explained, the proposals endorsed the Justice Department's belief that "the rights of victims of juvenile offenders should mirror the rights of victims of adult offenders."[63] They also embodied an exception for military proceedings under the view that "[b]ecause of the complicated nature of military justice proceedings, including proceedings held in times of war, the extension of victims' rights to the military was left to Congress. The Committee intends to protect victims' rights in military justice proceedings while not adversely affecting military operations."[64]

The proposal in the 106th Congress stated that:

> *The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States*. S.J.Res. 3 (106th Cong.); H.J.Res. 64 (106th Cong.).

Amendment in the 108th Congress

> *SECTION 1: The rights of victims of violent crime . . . shall not be denied by any State or the United States and may be restricted only as provided in this article.*
>
> *SECTION 2: A victim of violent crime shall have the right to . . . .*

Who is a Victim

The Amendment defines neither "victim" nor "violent crime." Nor does it explicitly authorize a legislative definition, although such authority is probably contemplated in Congress' authority to enact appropriate enforcement legislation and perhaps in the reservation for restrictions "dictated

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[61] H.J.Res. 173 (104th Cong.); H.J.Res. 174/S.J.Res. 52 (104th Cong.).

[62] H.J.Res. 129 ("The rights established by this article shall apply in all Federal proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and *proceedings in any district or territory of the United States not within a State*")(emphasis added). The italicized language in H.J.Res. 129 might have been sufficient to extend the amendment's coverage to victims of crimes tried in tribal courts. If so, it would be the only one to do so.

[63] S.Rept. 106-254 at 42; S.Rept. 105-409 at 37, each quoting, U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 22 (1998). This might have been the most difficult of the proposal's commands to translate, because it would often mark a departure from existing state practice, United States Department of Justice, Office of Justice Programs, Office for Victims of Crime, *New Direction From the Field: Victims' Rights and Services for the 21st Century* at 22 ("Although some state victims' bill of rights and constitutional amendments include rights for victims of juvenile offenders, most states have extended only selected rights to these victims"). Only three of the thirty-three state constitutional amendments expressly afford similar breadth of coverage for the victims of juvenile misconduct, ALASKA CONST. Art.1, §24; ORE.CONST. Art.I, §42; S.C.CONST. Art.I, §24; although a few more their state legislatures to bestow comparable treatment, ARIZ.CONST. Art.2, §2.1; OKLA. CONST. Art.II §34; S.C. CONST. Art.I §24; UTAH CONST. Art.1, §28(3).

[64] S.Rept. 106-254 at 42, *accord*, S.Rept. 105-409 at 37. Military tribunals already have a victims' rights regulatory requirement in place, Pischnotte & Quinn, *The Victim and Witness Assistance Program*, 39 AIR FORCE LAW REVIEW 57 (1996), but not all victims' rights advocates are impressed with its effectiveness, *Senate Hearing II* at 38 (prepared statement of Marlene A. Young, Executive Director, National Organization for Victim Assistance); *id.* at 56 (prepared statement of Beverly Harris Elliot, President, National Coalition Against Sexual Assault).

by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." In the absence of any such implementing statutory illumination, the courts would likely construe the terms in light of the remaining text of the Amendment, the ordinary meaning of the words, the meaning given the same words elsewhere in the law, implications of Congress' rejection of proposed alternatives, and explanations within the Amendment's legislative history.

Section 3 continues to carry the language found in previous proposals that denies the Amendment's benefits to those accused of the crime. As noted earlier, this would seem disqualify neither of the participants in a mutual assault nor inmates victimized during their incarceration.

The courts may also consider the word "victim" limited by the insistence in Section 3 that only the victim or the victim's lawful representative may claim the Amendment's benefits. The concept of "representative" is rather clearly stated in singular terms, as one who speaks in the interest of the victim rather than in his own interest;[65] parents and other relatives of a deceased or child victim might not themselves be considered victims simply by virtue of the relationship and as discussed below perhaps only one of them could be selected as the victim's representative.[66]

The Amendment uses the word "crime" rather than the less inclusive word, favored in many of the earlier proposals and often in existing federal law, "felony." Thus, it seems the Amendment protects the rights of victims of violent crimes other than felonies, *e.g.,* misdemeanors.[67] Of course, crimes which are indisputably nonviolent clearly cannot provide the foundation for a claim of right under the Amendment, a result which some may find unsatisfactory in some cases.[68]

Looking elsewhere in federal law for guidance, the courts might observe that the term "victim" has been assigned definitions which vary according to the context in which they are used, although the existing federal victims' rights statute might be thought to supply the most instructive description: *i.e.*, "'victim' means a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including–(A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court," 42 U.S.C. 10607(e)(2).[69]

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[65] S.Rept. 108-191 at 43 ("In all circumstances involving a 'representative,' care must be taken to ensure that the 'representative' truly reflects the interests–and only the interests–of the victim").

[66] Compare, 18 U.S.C. 3663A(a)(2)(". . . In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights . . .").

[67] "A 'crime of violence' can arise without regard to technical classification of the offense as a felony or a misdemeanor," S.Rept. 108-191, at 31.

[68] "First, consider the plight of an elderly woman who is victimized by a fraudulent investment scheme and loses her life's savings. Second, think of a college student who happens to take a punch during a bar fight which leaves him with a black eye for a couple [of] days. I do not believe it to be clear that one of these victims is more deserving of constitutional protection than the other," S.Rept. 105-409 at 42 (1998)(additional views of Sen. Hatch); *see also,* S.Rept. 108-191, at 50 (additional views of Sen. Hatch); Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME LAW REVIEW 39 (2001).

[69] In restitution cases, courts might look to the restitution definitions in 18 U.S.C. 3663 and 3663A: "For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent,

Of course the definition of "violent crime" plays a large role in determining who may be considered a victim for purposes of the Amendment. The definition from the legal dictionaries is very narrow: "*violent offenses*. Crimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon," BLACK'S LAW DICTIONARY 1564 (7th ed. 1999). It is a description drawn perhaps from the Federal Bureau of Investigation's Uniform Crime Reports which since 1960's have categorized only murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault as "violent crimes."[70] These are crimes against the person. The list includes neither crimes of violence against property nor those that portend violence. It encompasses neither arson, nor burglary, nor kidnaping.

Elsewhere in federal law, "violent crime" is sometimes thought of as synonymous with a "crime of violence," a concept ordinarily described in more sweeping terms, *e.g.,* "(a) an offense that has as an element of the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a *felony* and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 16 (emphasis added). Unfortunately, the various definitions of "violent crime" found in federal law are too diverse to yield a single standard.[71] Moreover, many of the earlier proposed victims' rights amendments spoke of "crimes of violence as defined by law." The present proposal is the first to speak of "violent crimes" and does not closely append a "defined by law" reference. The difference might be seen as a rejection of the definitions and definitional diversity of the term "crimes of violence" and perhaps of earlier interpretations of the "crimes of violence" phrase.

The issue of how the courts will construe the terms "victim" and "violent crime" becomes less problematic if they can be defined legislatively. A witness at the House hearings in the 107th Congress and again in the 108th Congress suggested that the Amendment comes with an implicit understanding that both Congress and state legislatures have complete latitude to define both "victim" and "violent crime" as long as they do not violate the Amendment:

> It should be noted that States, and the Federal Government, within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define "victim" is simply a corollary of the power to define the elements of

incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian."

[70] United States Department of Justice, Federal Bureau of Investigation, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS–1964 5 (1965); United States Department of Justice, Federal Bureau of Investigation, CRIME IN THE UNITED STATES 2001, available at http://www.fbi.gov.

[71] *Compare*, "For purposes of this subsection the term 'crime of violence' means an offense that is a *felony* and–(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(emphasis added), *with*, "'crime of violence' means–(A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or *(C) any felony under chapter 109A [sexual abuse], 110 [sexual exploitation of children], or 117 [transportation for illegal sexual activity],*" 18 U.S.C. 3156(a)(4)(emphasis added), and *with*, "'crime of violence' means any offense under federal state law, punishable by imprisonment for a term exceeding one year, that–(1) has an element of the use or attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," U.S.S.G. §4B1.2(a); *see also*, "Whoever . . . murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do . . . ." 18 U.S.C. 1959(a)(violent crimes in aid of racketeering activity).

> criminal offenses and, for State crimes, the power would remain with the State Legislatures.
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> It is intended that both the word "victim" and the phrase "victim's lawful representative" will be the subject of statutory definition by the state legislatures and the Congress, within their respective jurisdictions. No single rule will govern these definitions, as no single rule governs what conduct must be criminal. In the absence of a statutory definition the courts would be free to look to the elements of an offense to determine who the victim is, and to use its power to appoint appropriate lawful representatives, *Senate Hearing IV* at 181, 200; *House Hearing IV* at 19, 29 (statement of Steven T. Twist, General Counsel, National Victims Constitutional Amendment Network); *Senate Hearing V*; *House Hearing V* at 30, 48 (statement of Steven T. Twist, General Counsel, National Victims Constitutional Amendment Network).

The Senate Judiciary Committee's analysis of the Congress' enforcement authority under similar language in an earlier version of the Amendment made the similar point:

> This provision is similar to existing language found in section 5 of the 14th Amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to 'enforce' the rights, that is, to ensure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to Supreme Court review, flesh out the contours of the amendment by providing definitions of 'victims' of crime and 'crimes of violence,'" S.Rept. 106-254 at 41.

Does this mean that either Congress or the states are free to negate the Amendment by definition? May they define victims of violent crimes to include only those victims entitled to victims' rights under state law and only to the extent that state law permits? May they define victims of violent crimes so narrowly as to extinguish victims' rights under the Amendment? No, asserts the Senate Judiciary Committee report on the 108th Congress Amendment. Congress and the states are free to expand the Amendment's coverage to embrace victims of nonviolent crimes, but the Committee intends the term "victim of violent crime" to be understood broadly and to be so interpreted by the courts:

> The amendment extends broadly to all victims of a "violent crime." The phrase "violent crime" should be considered in the context of an amendment extending rights to crime victims, not in other possible narrower contexts. The most analogous federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a "crime of violence" and defines the phrase as one that "*involved* the use or attempted use of physical force against the person or property of another. * * * (emphasis added). The Committee anticipates that the phrase "violent crime" will be defined in these terms of "involving" violence, not a narrower "elements of the offense" approach employed in other settings. See, e.g., 18 U.S.C. 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence.
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> * * *
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> Of course, not all crimes will be "violent" crimes covered by the amendment. For example, the amendment does not confer rights on victims of larceny, fraud, and other similar offenses. At the same time, many States have already extended rights to victims of such offenses and the amendment in no way restricts such rights. In other words, the amendment sets a national "floor" for the protecting of victims rights, not any sort of "ceiling," S.Rept. 108-191, at 31, 32.

The Committee's reference to crimes of "physical force against the . . . property of another" as qualifying "violent crimes" seems to support the argument that a victim covered by the Amendment includes anyone whose property interest might unlawfully be made the subject of the use of physical force, *i.e.*, victims may include not only individuals but any legal entity capable of holding an interest in property. This reference and other remarks indicate the Committee understands the term "crime of violence" to describe crime violent or potentially violent in either its nature or its circumstances.[72]

Rights in What System

The Amendment makes little mention of the systems it reaches. It clearly applies to both federal and state criminal justice systems ("The rights of victims of violent crime . . . are hereby established and shall not be denied by any State or the United States . . ."). The elimination of the provision found in earlier proposals that address its coverage elsewhere might be construed as an indication that the Amendment on its face is inapplicable to juvenile proceedings, to proceedings before military tribunals, or to criminal proceedings in territorial or tribal courts. On the other hand, the omission may be seen as the elimination of redundancy, since each of the systems functions ultimately under the authority of either a state or the United States.[73]

Notice

Notice in the world of victims' rights takes three forms, notice to the victim: (1) of his or her rights, (2) of the status of the criminal investigation and prosecution, as well as the time, place, and outcome of related judicial proceedings, and (3) of the release or escape of the accused or convicted offender. Notice allows victims to assert their rights, facilitates their participation, assures them that justice is being done, and affords them the opportunity to take protective measures. The Amendment does not include a right to notification of the Amendment's benefits. Its provision for notification of release or escape applies only prior to conviction, *i.e.,* only with respect to the release or escape of *the accused.* It does, however, entitle victims to reasonable and timely notice of all public proceedings involving the crime.

[72] "It should also be obvious that a crime of violence can include not only acts of consummated violence but also of intended, threatened or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a 'violent crime' regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered crimes of violence for purpose of the amendment if identifiable victims exist. Similarly, some crimes are so inherently threatening of physical violence that they could be "violent crime" for purposes of the amendment. Burglary, for example, is frequently understood to be a crime of 'crime of violence' because of the potential for armed, or other dangerous confrontation. Similarly, sexual offense against a child, such as child molestation, can be 'violent crimes' because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. . . .Some crimes, such as drug or espionage offenses, do not ordinarily have such an identifiable victim and therefore would not ordinarily be covered by the amendment. However, in some unusual cases, a court might conclude that these offense in fact involved violence against an identifiable victim. For example, treason or espionage against the United States resulting death or injury to an American government official would produce an identifiable victim protected by the amendment," S.Rept. 108-191, at 31-2 (internal citations omitted).

[73] S.Rept. 108-191 at 78 (minority views)(arguing that based on the Amendment's history its requirements would presumably apply to military courts martial and to military commissions conducted under federal authority in the United States).

Contemporary Practices

A general right to notice of available rights and services is found in more than a few state codes and constitutions, either in the form of a victims' right or of a governmental obligation.[74] Existing federal law imposes the obligation on federal officials, 42 U.S.C. 10607. Nevertheless, its presence in the Amendment would represent a departure from the cast of most U.S. constitutional rights and in past proposals has given at least one member of the Senate Judiciary Committee pause.[75]

Most states give victims the option of being notified when an offender is to be released or has escaped from custody.[76] Existing federal law, extends the notification option only to the release of offenders, 42 U.S.C. 10605(b)(7). State constitutional amendments ordinarily require notification of court proceedings;[77] several, by constitution or statute or both, require notification of the arrest of an accused or other information concerning the status of the investigation or prosecution.[78]

Past Proposals

The resolutions introduced in the 104th Congress offered crime victims the right to notification of related proceedings, of the release or escape,[79] and came with a right to be informed of the amendment's benefits.[80] The pattern continued in successive Congresses with some alterations.

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[74] *E.g.*, TENN.CONST. art.II, §2 ("victims shall be entitled to the following basic rights . . . 8. The right to be informed of each of the rights established for victims"); ARK.CODE ANN. §16-90-1107 ("After initial contact between a victim and a law enforcement agency responsible for investigating a crime, the agency shall promptly give in writing to the victim: (1) an explanation of the victim's rights under this subchapter and (2) Information concerning the availability of [various victims' assistance, compensation, protection and other services]").

[75] S.Rept. 105-409 at 43-4 (additional views of Sen. Hatch) ("No other constitutional provision mandates that citizens be provided notice of the rights vested in the Constitution—not even the court-created *Miranda* warnings are constitutionally required. [The clauses of the Bill of Rights are ordinarily] written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government. This clause in the proposed victims' rights amendment would create an affirmative duty on the Government to provide notice of what rights the Constitution provides, turning this formulation on its head. . . . I fear that this provision might generate a body of law which will make fourth amendment jurisprudence simple by comparison. Finally, Congress will be empowered by section 3 of the proposed amendment to enforce its provisions, presumably including the question of how governmental entities must provide victims notice. Will this permit Congress to micro manage the policies and procedures of our State and local law enforcement agencies, prosecutors, and courts?").

[76] *E.g.*, W.VA.CODE §61-11A-8; WYO.STAT. §1-40-204.

[77] ALA.CONST., Amend. 557; ALASKA CONST. art.I, §24; ARIZ.CONST. art.2, §2.1; COLO. CONST. art.II, §16a; CONN. CONST. art.I, §8[b.]; FLA.CONST. art.I, §16(b); IDAHO CONST. art.I, §22; ILL. CONST. art.I, §8.1; IND.CONST. art.1, §13; LA.CONST. art.1, §25; KAN.CONST. art.15, §15; MD.D.OF RTS. art.47; MICH.CONST. art.I, §24; MISS. CONST. art. 3,§26A; MO.CONST. art.I, §32; NEB.CONST. Art.1, §28; NEV.CONST. art.1, §8; N.MEX. CONST. art.II, §24; N.C. CONST. art.I, §37; OHIO CONST. art.I, §10a; OKLA.CONST. art.II, §34; ORE. CONST. art. I, §24; S.C.CONST. art.I, §24; TENN.CONST. art.I, §35; TEX.CONST. art.I, §30; UTAH CONST. art.I, §28; VA.CONST. art.I, §8-A; WASH.CONST. art.I, §35; WIS. CONST. art.I, §9m.

[78] *E.g.*, S.C.CONST. Art.I, §24 ("victims of crime have the right to . . . be reasonably informed when the accused . . . is arrested. . . ."); NEV.CONST. Art. 1, §8[2] ("The legislature shall provide by law for the rights of victims of crime . . . to be (a) Informed, upon written request, of the status or disposition of a criminal proceeding at any stage of the proceeding"); ALA.CODE –15-23-62 (". . . the law enforcement agency shall provide to the victim . . . the following information . . . (3) the name of the law enforcement officer and telephone number of the law enforcement agency with the following statement attached: `If within 60 days you are not notified of an arrest in your case, you may call . . . for the status of the case . . .").

[79] H.J.Res. 173("notice of . . . every stage of the public proceedings . . . to be informed of any release or escape of the defendant"); H.J.Res. 174("to be informed of . . . every proceeding . . . to be informed of any release or escape"); S.J.Res. 52 (same); S.J.Res. 65("notice of . . . all public proceedings . . . to notice of a release . . . or an escape).

[80] H.J.Res. 174 ("notice of the victim's rights"); S.J.Res. 52 (same); S.J.Res. 65 ("notice of the rights established by this

The resolutions thereafter spoke of notice of related "public proceedings," struggled with the issue of notification of closed parole hearings,[81] and maintained a right to be informed of the amendments' benefits:[82]

> *A victim . . . shall have the right . . . to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime. . . to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender . . . to reasonable notice of a release or escape from custody relating to the crime . . . and to reasonable notice of the rights established by this article*. S.J.Res. 3 (106th Cong.); H.J.Res. 64 (106th Cong.).

Amendment in the 108th Congress

> *SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused;*

The Amendment differs from its antecedents in five respects. First, it demands that notice be timely as well as reasonable. Second, it drops all references to parole proceedings. Third, it extends to proceedings "involving the crime" rather than to proceedings "related to the crime." Fourth, the Amendment promises notice of the release or escape of "the accused." Fifth, there is no longer any declaration that a victim is entitled to notification of his or her rights under the Amendment.

The Amendment's grant of rights is subject to obvious facial limitations:

- the notice rights apply only with respect to *public proceedings*;
- the rights attach to those proceedings *involving the crime* not those related to the crime;
- victims are only entitled to *reasonable and timely* notice; and
- victims are only entitled to notice of the release or escape of *the accused.*

Public Proceedings

The "public proceedings" feature is not new. Yet there has always been some question whether courts and legislative bodies might by closing otherwise public proceedings curtail victims' notification and other rights that would otherwise be beyond judicial or legislative reach. The history of past proposals indicates that this may be the case:

> Victims' rights under this provision are also limited to 'public proceedings.' Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling

article").

[81] *E.g.,* H.J.Res. 71 (105th Cong.)("a victim . . . shall have the right . . . to the rights described in the preceding portion of this section [relating to notice, attendance, and participation rights in public proceedings] at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender").

[82] *E.g.,* S.J.Res. 6 (105th Cong.)("Each victim . . . shall have the rights . . . to notice of the rights established by this article; however, the rights to notice under this section are not violated if the proper authorities make a reasonable effort, but are unable to provide the notice, or if the failure of the victim to make a reasonable effort to make those authorities aware of the victim's whereabouts prevents that notice"); H.J.Res. 64 (106h Cong.)("a victim . . . shall have the rights . . . to reasonable notice of the rights established by this article").

> would plead guilty and agree to testify against his bosses. See 28 C.F.R. 50.9. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See 'The Classified Information Procedures Act' 18 U.S.C. App.3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place. S.Rept. 108-191 at 34; see also, S.Rept. 106-254 at 30, S.Rept. 105-409 at 25.[83]

Involving the Crime

The breadth of the phrase "*involving* the crime" used to describe the public proceedings covered by the notification right may raise questions too. The phrase clearly contemplates more than trial. Pre-trial and post-trial hearings involving motions to dismiss, to suppress evidence, to change venue, to grant a new trial, and any of the host of similar proceedings that flow to or from a criminal trial seem to come within the meaning of the term. The Senate reports' discussion of proceedings "*related to* the crime" in earlier versions, for instance, specifically mention appellate proceedings, S.Rept. 106-254 at 31, S.Rept. 105-409 at 26.

The same reports indicate that at least at one time covered release proceedings were understood to include those involving "a release [from custody] of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment," *Id*. at 36 and 30. Crime relatedness, understood in such terms, would presumably carry victim notice rights to a fairly wide range of civil and quasi-civil proceedings, *e.g.*, habeas and civil forfeiture proceedings, deportation and extradition hearings, and administrative disciplinary reviews (if conducted publicly before a tribunal) to name but a few.

It may be for this reason that the phrase was changed to "involving the crime," a phrase that arguably imposes greater limits on the class of proceedings than might be considered "related," although not clearly sufficient to excuse notice of the habeas, forfeiture, deportation, or the extradition proceedings.[84] Historical proposals were thought to perhaps embody notice rights for the victims of a defendant's past crimes, and victims of charges that have been dropped or dismissed, as well as victims of charges that had resulted in acquittal.[85] The change might be considered a repudiation of that construction as well.

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[83] S.Rept. 108-191 at 38 ("The right to be heard is also limited to 'public proceedings.' As discussed previously at greater length, a victim has no right to be heard at a proceeding that the court has properly closed under the existing standards governing court closures"); cf., *Senate Hearing V; House Hearing V* at 35 (statement of Steven T. Twist)(emphasis added)("The right would also extend to post-conviction public release proceedings, for example parole or conditional release hearings. In jurisdictions that have abolished parole in favor of truth in sentencing regimes, many may still have conditional release. *Only if the jurisdiction also has a 'public proceeding' prior to such a conditional release would the right attach*"); see also, *Senate Hearing IV* at 187; *House Hearing IV* at 22.

[84] One witness, however, thought it more likely to confirm an intent to embrace civil proceedings, *Senate Hearing V; House Hearing V* at 79 (statements of James Orenstein) ("Some public proceedings 'involving the crime' are civil in nature, and normally proceed without any participation by the executive branch of government. Here again, the change in language from S.J.Res. 3 [106th Cong.] could be problematic: that bill used the phrase 'relating to the crime' which the Senate Judiciary Committed noted would 'typically . . . be the criminal proceedings arising from the filed criminal charges, although other proceedings might also be related to the crime.' Senate Report at 30-31. A court interpreting the current bill might conclude that the change from 'relating to' to 'involving' was intended to make it easier to apply the Amendment to proceedings outside the criminal context "); see also, *Senate Hearing IV* at 122; *House Hearing IV* at 50.

[85] "Frequently, criminal defendants are suspected to have committed crimes for which they are never charged or for which charges are later dropped, even though significant evidence may exist that the defendant did indeed commit the crime. Do the victims of these crimes have rights under the proposed amendment? If so, are they the same as the rights

The Senate Judiciary Committee, however, indicates that no such repudiation was intended and states simply that the "public proceedings are those 'relating to the crime,'" S.Rept. 108-191 at 34. In doing so, it might be thought to have embraced earlier descriptions of proceedings related to the crime, even though the Committee's examples in the 108th Congress are much more modest in some places, *id.* ("the right applies not only to initial hearings on a case, but also rehearings, hearing at an appellate level, and any case on a subsequent remand").[86]

Reasonable and Timely Notice

The addition of "timely" unquestionably seems significant, because it would appear to greatly reduce the prospect of "reasonable" but ineffective notice. Yet the Committee report issued after the change makes no note of it and continues to describe the obligation in the same terms used prior to the change.[87] Under past proposals it was unclear whether reasonableness was to be judged by the level of official effort or by the effectiveness of the effort. The Senate reports noted and continue to note that heroic efforts were not expected but due diligence was, S.Rept. 108-191 at 34; S.Rept. 106-254 at 30, S.Rept. 105-409 at 25. Yet the obvious purpose for the right to notice was to provide a gateway to the Amendment's other rights. Even without the addition of the clarifying "timely" requirement, what was reasonable might have been judged by whether the efforts were calculated to permit meaningful exercise of the Amendment's other rights.[88]

The Senate reports, however, explain that in rare circumstances notice by publication might be reasonable,[89] although if judged by existing due process standards such notice might not be adequate in ordinary circumstances.[90] Notice given after a proceeding was conducted might have

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of the victims of charged counts or of the defendant? Such victims, of course, would have the same rights to notice and allocution relating to conditional release, the acceptance of negotiated pleas (perhaps substantially complicating plea bargains) and sentencing," S.Rept. 105-409 at 42 (additional views of Sen. Hatch).
Under existing federal law, sentencing courts must consider "relevant conduct" that is "part of the same course of conduct or common scheme or plan as the offense of conviction," U.S.S.G. §1B1.3(a)(2), that includes misconduct for which the defendant has never been charged or even for which he may have been acquitted, *United States v. Watts*, 519 U.S. 148 (1997).

[86] But see, S.Rept. 108-191 at 35 ("The release [which triggers a notification requirement] must be one 'relating to the crime.' This includes not only a release after a criminal conviction but also, for example, a release of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment, or a release pursuant to a habitual sex offender statute "). As discussed below, this statement seems totally at odds with the use of the word "accused" rather than "offender" in the text of the Amendment; "after a criminal conviction" or after "a defendant [is] found not guilty of a crime by reason of insanity," the individual can no longer to called "accused."

[87] Compare, S.Rept. 108-191 at 33-34, with, S.Rept. 106-254 at 30-1, S.Rept. 105-409 at 25-6.

[88] The right to notice of hearings at which an individual has a right to be heard is a component of due process under existing law. "The Supreme Court has long made clear that due process requires notice reasonably calculated to provide actual notice of the proceedings and a meaningful opportunity to be heard. In *City of West Covina v. Perkins*, [525 U.S. 234, 240] (1999), the Court explained the notice requirement in these words: A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)('Th[e] right to be heard has little reality or worth unless one is informed that the matter [affecting one's property rights] is pending and can choose for himself whether to appear or default, acquiesce or contest')", *Nazarove v. INS*, 171 F.3d 478, 482-83 (7th Cir. 1999).

[89] S.Rept. 106-254 at 30 ("In rare mass victim cases (*i.e.*, those involving hundreds of victims), reasonable notice could be provided by mean[s] tailored to those unusual circumstances, such as notification by newspaper or television announcement"); *see also*, S.Rept. 105-409 at 25.

[90] *Small v. United States*, 136 F.3d 1334, 1336 (D.C.Cir. 1998)("'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane v. Central Hanover Bank & Truest Co.*, 339 U.S. at 314. As *Mullane* made clear, the Due Process Clause does

seemed unreasonable because the want of timely notice might constitute an effective exclusion from the proceedings or might defeat the right to make a victim impact statement.[91] The addition of a timeliness requirement seems to reduce the possibility of "reasonable" but untimely notification.[92]

In the context of release notifications, the most vexing reasonableness questions may not involve individual circumstances but general conditions. In some jurisdictions, the Amendment may require notification of a host of victims who would not previously have been entitled to notification and whose identity and location is therefore unknown to custodial authorities.[93] Would publication notice be considered reasonable in such cases? Would the existence of an online or other automated system available to the general public and containing release and escape dates retrievable by prisoner name, without more, constitute reasonable notice?

Application may be particularly challenging in the area of bail. The Amendment grants both a right to consideration of the victim's safety and a right to reasonable notice and attendance. Under normal circumstances it might not be unusual for an accused to be released on recognizance or bail before authorities could reasonably be expected to provide victims with timely notice. It may be that the Amendment contemplates postponement of the accused's initial judicial appearance until after victims can be notified and can be given a reasonable period of time to prepare and present their views. At one time, amendment proposals seem to explicitly anticipate that a failure of timely notice in a bail context could be rectified by recourse to the provision in the Amendment that permitted the bail decision to be revisited at the behest of a victim.[94] The

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not demand actual, successful notice, but it does require a reasonable effort to give notice. '[P]rocess which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' *Mullane*, 339 U.S. at 315. . . . [T]he *Mullane* Court observed that '[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper.' *Id*. Almost fifty years after *Mullane*, in an increasingly populous and mobile nation, newspaper notices have virtually no change of alerting an unwary person that he must act now forever lost his rights").
The Senate reports noted that "reasonableness" must be judged by the circumstances of an individual case. Thus, "[w]hile mailing a letter would be 'reasonable' notice of an upcoming parole release date, it would not be reasonable notice of the escape of a dangerous prisoner bent on taking revenge on his accuser," S.Rept. 108-191 at 35; S.Rept. 106-254 at 36; S.Rept. 105-409 at 30.

[91] On a related question, "[i]t has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required," *Nazarova v. INS*, 171 F.3d at 483. Due process, however, does include the right of a non-English speaker to have interpreter present in order to participate in a proceeding at which the individual has a right to be heard, *Id*. at 484-85.

[92] In the view of one commentator, "'Timely' notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend," *Senate Hearing V*; *House Hearing* at 31 (statement of Steven T. Twist); see also, *Senate Hearing IV* at 183; *House Hearing IV* at 20 (statement of Steven T. Twist).

[93] Not every state has both a release and escape notification statute, many have only one or the other. Some may limit the victims entitled to notice more narrowly than the Amendment. The Amendment grants victims of violent crimes the right to notice; some offer the right only to victims of certain violent crimes, *e.g.*, Wis.Stat.Ann. §304.063 (victims of homicide, sexual assault, and child molestation). The Amendment applies to escapes and releases occurring after its effective date regardless of when the underlying crime occurred; many jurisdictions apply the right with respect to self-identifying victims of prisoners sentenced after the effective date of the statutory provision creating or implementing the right, *e.g.*, N.Y.Crim.Pro.Law §380.50 (notice is provided by certified mail to victims who have submitted notification cards distributed to them shortly after the defendant is sentenced).

[94] Past proposals had a provision which declared, ". . . Nothing in this article shall provide grounds to . . . reopen any proceeding . . . except with respect to conditional release . . . ." *e.g.*, S.J.Res. 3 (106th Cong.). Since the amendment has no similar prohibition on reopening at the petition of a victim, no bail exception is necessary. Of course, whether the initial bail hearing is delayed or the accused is re-arrested following the victim's petition to reopen, the result is the

Amendment no longer contains that explicit provision, but nothing in the Amendment precludes revisitation – other than abandonment of the earlier explicit provision perhaps.

Release or Escape of the Accused

For the first time, the Amendment refers to notice of the release or escape of *the accused*. The implication is that there is no right to notice of a release or escape following conviction, since at that point the defendant is "convicted" rather than "accused." If this is the Amendment's meaning, the consequences of the change are considerable. The administrative burdens associated with notifying victims every time an inmate is released from custody are not insignificant, particularly in those jurisdictions without any comparable requirement of their own. This is especially true if the Amendment is construed to apply to the future release or escape of prisoners convicted of crimes committed prior to the effective date of the Amendment.

Nevertheless, the Committee report in the 108th Congress suggests that the Senate Judiciary Committee considers the terms "accused" and "convicted" interchangeable and intended no change from earlier more generously worded proposals:

> The release [which triggers a notification requirement] must be one "relating to the crime." This includes not only a release after a criminal conviction but also, for example, a release of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment, or a release pursuant to a habitual sex offender statute, S.Rept. 108-191 at 35.

No Rights Warnings

Notice of rights had been a feature of the past proposals from the beginning. It followed the lead of several state constitutions and statutes. It was perhaps seen as a victim's counterpart to the *Miranda* warnings enjoyed by an accused and as a prerequisite if the Amendment were to function effectively.[95] There were objections, however, that the warnings were out of character with the other rights conveyed by the Constitution and might pose implementation problems – objections that ultimately prevailed apparently.[96]

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same–an accused is detained longer than would otherwise be the case in the name of victims' rights, S.Rept. 105-409 at 44 (additional views of Sen. Hatch)("This provision in particular has perhaps the greatest potential to collide with the legitimate right of defendants. All defendants and convicts have a constitutionally protected liberty interest in conditional release, once such release is granted. Permitting victims to move to reopen such proceedings or invalidate such rulings, would, of course, necessitate the re-arrest and detention of released defendants and convicts, likely implicating their liberty interest").

[95] "Victims' rights are of little use if victims remain unaware of them. Since victims deserve the eight basic rights [of the amendment], they should be informed about those rights. Not only does this serve to ensure that victims can exercise their rights, but it can even improve the functioning fo the criminal justice process. Victims who have been informed about their role in the process are in a better position to cooperate with police, prosecutors, and courts to bring about a proper resolution of the case. Victims deserve appropriate notice of their rights in the process," S.Rept. 106-254 at 26.

[96] "I have significant concerns about the necessity and wisdom of . . . providing that covered victims shall have right 'to reasonable notice of the rights established' by the amendment. No other constitutional provision mandates that citizens be provided notice of the rights vested by the Constitution – not even the court-created *Miranda* warnings are constitutionally required. In an analogous context, Justice O'Connor noted that 'the free exercise clause is written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government,' This clause in the proposed victims' rights amendment would create an affirmative duty on the Government to provide notice of what rights the Constitution provides, turning this formulation on its head.

Not to Be Excluded

The Constitution promises the accused a public trial by an impartial jury[97] and affords him the right to be present at all critical stages of the proceedings against him.[98] It offers victims no such prerogatives. Their status is at best that of any other member of the general public and, in fact, the Constitution screens the accused's right to an impartial jury trial from the over exuberance of the public.[99]

Moreover, victims are even more likely to be barred from the courtroom during trial than members of the general public. Ironically, the victim's status as a witness, the avenue of most likely access to pre-trial proceedings, is the very attribute most likely to result in exclusion from the trial.

Sequestration, or the practice of separating witnesses and holding outside the courtroom all but the witness on the stand, is of ancient origins and "consists merely in preventing one prospective witness from being taught by hearing another's testimony."[100] The principle has been embodied in Rule 615 of the Federal Rules of Evidence and in state rules that adopt the federal practice.[101]

"Moreover, I do not believe that sufficient consideration has been given to the practical aspects of the requirement. Which governmental entity would be required to provide the notice? Would it be the police, when taking a crime report? The prosecutor prior to seeking an indictment or filing an information? Or perhaps the court at some other stage in the process? At what point would the right attach – when the crime is committed? When an arrest is made? . . .Does the term presume that the government entity providing notice must have assimilated the Supreme Court's latest jurisprudence interpreting victims' rights when giving notice? . . . .

"Finally, Congress will be empowered . . . to enforce its provisions presumably including the question of how governmental entities must provide victims notice. Will this permit Congress to micro manage the policies and procedures of our state and local law enforcement agencies, prosecutors, and courts? I believe greater consideration must be given to these questions before a right to notice of the rights guaranteed by the amendment is included in the Constitution," S.Rept. 105-409 at 43-4 (additional views of Sen. Hatch).

[97] "*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence," U.S.Const. Amend. VI (emphasis added).

[98] *United States v. Gibbs*, 182 F.3d 408, 436 (6th Cir. 1999), citing, *United States v. Gagnon*, 470 U.S. 522, 526 (1985), and *Faretta v. California*, 422 U.S. 806, 819n.15 (1975).

[99] *Woods v. Dugger*, 923 F.2d 1454, 1459-460 (11th Cir. 1991)(finding a Sixth Amendment violation in a case involving the murder of a prison guard, marked by extensive pretrial publicity, in a community where the prison system employed a substantial percentage of the population, and in which more than half of the members in attendance during the course of the trial were uniformed prison guards); *Norris v. Risley*, 918 F.2d 828, 834 (9th Cir.1990)(finding a Sixth Amendment violation in a kidnaping/rape case in which women wearing "Women Against Rape" buttons permeated the courtroom and its environs)("we find the risk unconstitutionally great that these large and boldly highlighted buttons tainted Norris's right to a fair trial both by eroding the presumption of innocence and by allowing extraneous, prejudicial considerations and cross-examination"). *Norris* also noted a similar view among the state courts, "A decision of the West Virginia Supreme Court is informative regarding the wearing of buttons during trial. State v. Franklin, 327 S.E.2d 449 (W.Va. 1985) involved a prosecution for driving under the influence of alcohol, resulting in death. During the trial, various spectators from an organization campaigning under the acronym MADD (Mothers Against Drunk Driving) wore buttons inscribed with the capital letters MADD. Most jurors knew what the initials stood for. In reversing the conviction and remanding for a new trial, the court noted that the trial court's 'cardinal failure . . . was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty.' Id. at 455," 918 F.2d at 832.

[100] VI WIGMORE ON EVIDENCE §§1837, 1838 (1940 ed.).

[101] F.R.Evid. 615("At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1)

Victims' advocates contend that it should be fundamental that individuals may attend the entire trial involving the crime visited upon them. Yet an absolute right to attend all proceedings may sometimes be unfair, and in some instances even a violation of due process or the right to trial by an impartial jury.

The Amendment assures victims of the right not to be excluded from any public proceedings involving the crime. It is one area where balancing the interests of victim, defendant, and government may be most challenging. The right brings with it no auxiliary right to transportation to such proceedings, a companion that might accompany a right to attend. It applies to only those functions that qualify as official "proceedings." It operates only with respect those proceedings that are "public."

Contemporary Practices

In response to the debate, about a third of the states now permit victims to attend all court proceedings regardless of whether the victim is scheduled to testify;[102] another group allows witnesses who are victims to attend subject to a showing as to why they should be excluded;[103] a few leave the matter in the discretion of the trial court;[104] and some have maintained the traditional rule – witnesses are sequestered whether they are victims or not.[105]

Subject to Rule 615 of the Federal Rules of Evidence which permits exclusion of victim/witnesses, the federal statutory victims' bill of rights recognizes the right of victims "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial," 42 U.S.C. 10606(b)(4).

In federal capital cases, victims who attend a trial are not disqualified from appearing as witnesses at subsequent sentencing hearings absent a danger of unfair prejudice, jury confusion, of the jury being misled, or as constitutionally required.[106] In other federal criminal cases, victims may be excluded from trial only as constitutionally required, 18 U.S.C. 3510(a).

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a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present").

[102] A few accomplish this result by requiring the victims who are witnesses testify first and then be allowed to remain, *e.g.*, VT.R.EVID. 615 ("At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion; after a witness' testimony has been completed, however, the witness may remain within the courtroom, even if the witness subsequently may be called upon by the other party or recalled in rebuttal, unless a party shows good cause for the witness to be excluded. . .").

[103] *E.g.,* CONN.CONST. art.I, §8[b.](the victim has the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony); FLA.CONST. Art.1, §16(b)(victims have the right to be present at all critical stages of the criminal proceedings to the extent that the victim's presence does not interfere with the constitutional rights of the accused).

[104] *E.g.*, WASH.R.EVID. 615 (emphasis added)("At the request of a party the court *may* order witnesses excluded so that they cannot hear the testimony of other witnesses . . ."). The federal rule in contrast declares that the court "shall" order sequestration under such circumstances.

[105] *E.g.*, HAW.R.EVID. 615.

[106] 18 U.S.C. 3510(b); 3593(c). *See also*, *United States v. McVeigh*, 958 F.Supp. 512, 514-15 (D.Colo. 1997)(permitting victims to attend trial with the observation that the court's control over any subsequent sentencing hearing would permit protective measures against any prejudicial impact). The *McVeigh* trial court had barred victim-witnesses from trial prior to the enactment of section 3510 and the amendment of section 3593(c). Following that initial sequestration order, the Court of Appeals had held that victim-witnesses had no standing based on 42 U.S.C. 10606 to seek

Past Proposals

Almost from the beginning virtually every proposed amendment granted crime victims the right "not to be excluded" from related public proceedings:[107]

> *A victim . . . shall have the right[] . . . not to be excluded from, any public proceedings relating to the crime*. S.J.Res. 3 (106th Cong.); H.J.Res. 64 (106th Cong.).

Amendment in the 108th Congress

> *SECTION 2. A victim of violent crime shall have the right . . . not to be excluded from such public proceeding . . . .*

It has been suggested that the phrase "not to be excluded" in the Amendment was originally used to avoid the claims that the Amendment entitled victims to transportation to relevant proceedings or to have proceedings scheduled for their convenience or to free them from imprisonment, S.Rept. 108-191 at 35-6; S.Rept. 106-254 at 31, S.Rept. 105-409 at 26.[108] In this it would be unlike a defendant's right to attend. Yet like a defendant's right to attend, the use of the phrase has been thought to permit exclusion of the victim for disruptive behavior, excessive displays of emotion, and other forms of impropriety for which a defendant might be excluded, *Id.*

Under existing law, the usual rationale for exclusion is to prevent victim/ witnesses from having their testimony colored by the testimony of other earlier witnesses.[109] Victim exclusion is one of the features of existing law that the Amendment seeks to overcome. How its command may be implemented is less apparent. In single victim cases, both constitutional policies (victim's rights and defendant's due process rights) could be honored simply by having the victim testify first. The two policies might also be reconciled by refusing to allow attending victims to testify, since the right not to be excluded does not include the right to testify and the right to be heard does not extend to trial testimony. The issue might be resolved alternatively on victim-defendant equality grounds. The defendant is constitutionally entitled to attend the entire trial even if he is ultimately to be a witness. The Amendment may be seen as an equalizer. If so, it may not preclude defense counsel from commenting upon a victim's opportunity to color his or her testimony.[110]

The application of the "public proceeding" limitation may be as uncertain here as in the case of victim notification. There may be some question as to what standards should be used to determine whether proceedings should be considered "public" for purposes of the Amendment and whether

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mandamus in order to overturn the lower court's sequestration order, *United States v. McVeigh*, 106 F.3d 325, 334-35 (10th Cir. 1997).

[107] The exceptions occurred early on, H.J.Res. 173 (104th Cong.)(the right "to be present at, every stage of the public proceedings, unless the court determines there is good cause for the victim not to be present"); H.J.Res. 174 (104th Cong.)("given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender"); S.J.Res. 52 (104th Cong.) (same).

[108] One hearing witness suggested that omission of the phrase "if present" from earlier versions of this provision might undermine this purpose, *House Hearing V* at 79; *Senate Hearing IV* at 121-22; *House Hearing IV* at 50 (statement of James Orenstein).

[109] "The purpose behind the sequestration of witnesses is to discourage and expose fabrication, inaccuracy and collusion. *see* [F.R.Evid. 615] Notes of Advisory Committee on Proposed Rules, and to minimize the opportunity that each witness will have to tailor his testimony," *United States v. Hickman*, 151 F.3d 446, 454 (5th Cir. 1998).

[110] *Portuondo v. Agard*, 529 U.S. 61, 73 (2000)("Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate – and indeed, given the inability to sequester the defendant, sometimes essential – to the central function of the trial, which is to discover the truth." Some suggest that comments on a victim-witness' credibility are preferable to exclusion as a means of ensuring a fair trial for the accused, *cf.* S.Rept. 105-409 at 82 (additional views of Sen. Biden).

the public or confidential character of proceedings is subject to judicial, legislative or administrative adjustments. A court might seek instruction from the law governing the rights of the public to attend judicial proceedings.

A public trial is among the rights the Sixth Amendment promises the criminally accused. Even where the accused agrees to closed proceedings, First Amendment free press interests may require open proceedings. When asked whether particular proceedings may be closed to the press, the courts have considered "whether the place and process have historically been open to the press and general public . . . [and] whether public access plays a significant positive role in the functioning of the particular process in question," *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986). When asked to close particular proceedings over the objections of the accused, the courts, using the standards developed in press access cases, have demanded that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[111]

There may be some related uncertainty over whether the Amendment's attendance right applies to historically public events that are now ordinarily held privately. For example, does the Amendment empower immediate family members of a murder victim to be notified of and attend the execution of the defendant? Historically, capital punishment and other types of corporal punishment were publicly administered.[112] Victims and anyone else so inclined might attend.[113] Most state laws now call for executions to occur in the presence of official witnesses, rather than being conducted publicly. Those who attend are either identified by statute[114] or their selection is left to the discretion of prison authorities.[115] A handful permit two or three members of the victim's immediate family to be present.[116] And in several, although the number of official witnesses may be limited, prison officials enjoy relatively unlimited discretion which they would appear free to exercise to the benefit of victims or their representatives.[117] In cases involving

[111] *Waller v. Georgia*, 467 U.S. 39, 48 (1984)(holding the closure of an entire suppression hearing unjustified under the standards of *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984)).

[112] *The Executioner's Song: Is There a Right to Listen?* 69 VIRGINIA LAW REVIEW 373, 375-78 (1983).

[113] At the time of public executions, rape and robbery, as well as murder, were capital offenses in a number of states. As a consequence, direct victims of a capital offense might well be available to witness the execution of the offender. Since it appears that only crimes involving the taking of a human life may today be made punishable by death, only the family or friends of a victim would be available to attend.

[114] *E.g.*, CONN.GEN.STAT.ANN. §54-100 (". . . Besides the warden or deputy warden and such number of correction officers as he thinks necessary, the following persons may be present at the execution, but no others: The sheriff of the county in which the prisoner was tried and convicted, the commissioner, a physician of a correctional institution, a clergyman in attendance upon the prisoner and such other adults, as the prisoner may designate, not exceeding three in number, representatives of not more than five newspapers in the county where the crime was committed, and one reporter for each of the daily newspapers published in the city of Hartford").

[115] *E.g.*, ARIZ.REV.STAT.ANN. §13-705 ("The director of the state department of corrections or the director's designee shall be present at the execution of all death sentences and shall invite the attorney general and at least twelve reputable citizens of the director's selection to be present at the execution. The director shall, at the request of the defendant, permit clergymen, not exceeding two, whom the defendant names and any persons, relatives or friends, not exceeding five, to be present at the execution. The director may invite peace officers as the director deems expedient to witness the execution. No persons other than those set forth in this section shall be present at the execution nor shall any minor be allowed to witness the execution").

[116] Only one state, New Jersey, appears to explicitly bar victims' relatives from the execution, N.J.STAT.ANN. §2C:49-7[d.]("the commissioner shall not authorize or permit any person who is related by either blood or marriage to the sentenced persons or to the victim to be present at the execution. . .").

[117] *E.g.*, COLO.REV.STAT.ANN. §16-11-404 (". . . There shall also be present [at the execution of a death sentence] a

hundreds or thousands of victims, conflicts may arise should a defendant's privacy right to a dignified death by execution conflict with victims' rights to attend.

Committee commentary indicates that the Amendment plays no role in what public proceedings can be closed even though that action denies victims notice, attendance and allocution rights. It suggests that a victim has no ground to object if a decision is made to close a traditionally public proceeding, "The amendment works no change in the standards for closing hearings, but rather simply recognizes that nonpublic hearings take place," S.Rept. 108-191 at 34; S.Rept. 106-254 at 30; S.Rept. 105-409 at 25.

To Be Heard

Unlike the rights to notice and not to be excluded, the right to be heard is a right to participate. Proceedings at which it may be invoked are described with greater particularity in the Amendment. Although victim impact statements are a common sentencing feature, victim participation elsewhere varies considerably from jurisdiction to jurisdiction and according to the stage of the process at issue.

The Amendment affords victims the right "to be heard at public release, plea, sentencing, reprieve, and pardon proceedings" subject to a rule of reason. It does not on its face give them the right to be heard in closed proceedings or to be heard on other pre-trial motions, at trial, perhaps on appeal, or with respect to related forfeiture or habeas proceedings. The history of past, more narrowly drawn provisions indicates that the right may embrace all of these and more.

Contemporary Practices

Public release (bail et al.)

At one time, the victim was not considered a legitimate participant in the bail hearing. In fact, neither the safety nor any other interest of the victim was thought to be a relevant consideration. Bail was a guarantee against suspect flight. That was all. The amount of security required and the conditions imposed for pre-trial release were calculated solely to insure the courtroom presence of the accused at the appointed hour.[118] Most states had, and still have, right to bail clauses for noncapital offenses in their state constitutions.[119] Those jurisdictions that did not have a right to bail clause had and have a prohibition against excessive bail,[120] like that found in the United States Constitution, that some read to include or herald a constitutional right to bail even where none was explicitly granted.[121]

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physician and such guards, attendants and other persons as the executive director or his designee in his discretion deems desirable, not to exceed fifteen persons. . .").

[118] At both state and federal law, the presumption of bail was so strong that even after conviction when the defendant sought bail pending appeal most shared the opinion of Justice Jackson, sitting on a circuit court of appeals panel: "Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted," *Williamson v. United States*, 184 F.2d 280, 282-83 (2d Cir. 1950), quoted in National Conference on Bail and Criminal Justice, BAIL IN THE UNITED STATES: 1964, 5 (1964).

[119] *E.g.*, ALA.CONST. art.I, §16; ALASKA CONST. art.I, §11; ARIZ.CONST. art.2, §22; ARK. CONST. art.2, §8; CAL.CONST. art.1, §12.

[120] *E.g.*, GA.CONST. art.I, §1 ¶17; HAW. CONST. art.I, §12.

[121] *Huihui v. Shimoda*, 64 Haw. 527, 530-39, 644 P.2d 968, 971-76 (1982).

In many jurisdictions, the defendant-exclusive view slowly gave way to a recognition that public and individual safety are legitimate concerns for a judicial officer to consider when deciding whether an accused should be released on bail, or more often, the conditions placed upon the release of the accused. In some instances, the right to bail clause has been amended;[122] in some, the state courts have interpreted the right to bail to include a witness protection and judicial integrity exception;[123] courts in still other states have held that the right to bail clauses permit imposing victim or public safety conditions[124] and allow revocation of bail if the conditions have been broken.[125]

Finally, the United States Supreme Court removed the cloud formed by the contention that a refusal to grant pretrial bail, because of the threat to public or individual safety posed by the accused, might violate either the United States Constitution's excessive bail clause or its due process clauses or both. The Court declared that neither clause bars legislative creation of a system that conditions pretrial release upon public safety as well as preventing flight.[126]

Only a few states expressly grant the victim the right to be heard at the defendant's bail hearing either specifically or under a general right to be heard at all proceedings.[127] A few more permit consultation with the prosecutor prior to the bail hearing.[128] Most allow victims to attend.[129] And virtually all provide either that victims should be notified of bail hearings or that victims should be notified of the defendant's release on bail.[130]

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[122] *E.g.*, ILL.CONST. Art.1, §9 ("All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person").

[123] *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 79-80, 322 N.E.2d 837, 840-41 (1985); *State v. Mecier*, 136 Vt. 336, 339, 388 A.2d 435, 438 (1978); *In re Humphrey*, 601 P.2d 103, 106 (Okla. Crim.App. 1979).

[124] *Henley v. Taylor*, 324 Ark. 114, 115-16, 918 S.W.2d 713, 714 (1996).

[125] *State v. Dodson*, 556 S.W.2d 938, 945 (Mo.App. 1977); *Mello v. Superior Court*, 117 R.I. 578, 583-85, 370 A.2d 1262, 1264-265 (1977).

[126] *United States v. Salerno*, 481 U.S. 739, 755 (1988)("The Act [being challenged on excessive bail and due process grounds] authorizes the detention prior to trial of arrestees charged with serious felonies who are found, after an adversary hearing, to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government – a concern for the safety and indeed the lives of its citizens – on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment").

[127] *E.g.*, S.D.COD.LAWS ANN. §23A-28C-1("Consistent with §23A-28C-4 [defining victims], victims of the crime, including victims of driving under the influence vehicle accidents, have the following rights: . . . (3) to testify at scheduled bail or bond hearings regarding any evidence indicating whether the offender represents a danger to the victim or the community if released").

[128] *E.g.*, VT.STAT.ANN. tit.13 §5308 ("If practicable the victim of a listed crime shall be given notice of the defendant's arraignment by the law enforcement agency that issued the citation or made the arrest. The victim of a listed crime shall have the right to be present at the defendant's arraignment. The prosecutor's office shall inform the victim about the issues concerning bail and the prosecutor shall advise the court of the victim's position regarding bail").

[129] *E.g.*, OHIO REV.CODE ANN. §2930.09.

[130] *E.g.*, ALA.CODE §15-23-75 (4)("If the terms and conditions of a post-arrest release include a requirement that the accused post a bond, the sheriff or municipal jailer shall, upon request, notify the victim of the release on bond of the defendant"); NEB.REV.STAT. §81-1848 ("Victims as defined in section 29-119 shall have the following rights: . . . (b) to receive from the county attorney advance reasonable notice of any scheduled court proceedings and notice of any changes in that schedule").

Under federal law, victims of alleged acts of interstate domestic violence or interstate violations of a protective order have a right to be heard at federal bail proceedings concerning any danger posed by the defendant.[131] In other federal cases, victims' prerogatives seem to be limited to the right to confer with the prosecutor, and notification of, and attendance at, all public court proceedings.[132]

Plea Bargains

Negotiated guilty pleas account for over ninety percent of the criminal convictions obtained.[133] Plea bargaining offers the government convictions without the time, cost, or risk of a trial, and in some cases a defendant turned cooperative witness; it offers a defendant conviction but on less serious charges, and/or with the expectation of a less severe sentence than if he or she were convicted following a criminal trial,[134] and/or the prospect of other advantages controlled, at least initially by the prosecutor – agreements not to prosecute family members or friends, or to prosecute them on less serious charges than might otherwise be filed;[135] forfeiture concessions;[136] testimonial immunity;[137] entry into a witness protection program;[138] and informant's rewards,[139] to mention a few.

For the victim, a plea bargain may come as an unpleasant surprise, one that may jeopardize the victim's prospects for restitution, one that may result in a sentence the victim finds insufficient,[140]

[131] 18 U.S.C. 2236.

[132] 42 U.S.C. 10606(b).

[133] Chin & Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL LAW REVIEW 697, 698 n.2 (2002)(for more than twenty-five years, more than ninety percent of convictions in the United States have been the result of guilty pleas, citing *Sourcebook of Criminal Justice Statistics 1999*, 432-33 (2000) and Newman, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966)); *see also*, Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 211 (2002)(only 3,329 of the 67,731 defendants convicted of federal crimes in the fiscal year ending in September 30, 2001, were found guilty by a judge or jury following a criminal trial; the rest pled guilty or nolo contendere).

[134] In addition to extraordinarily broad discretion to initiate or abandon a prosecution, *Wayte v. United States*, 470 U.S. 598 (1985); *Town of Newton v. Rumery*, 480 U.S. 386 (1987), prosecutors play an important role in sentencing, *e.g.*, 18 U.S.C. 3553(b)(federal court may depart from the federal sentencing guidelines upon the motion of the prosecutor); 18 U.S.C. 3553(e)(federal court may sentence a defendant below an otherwise mandatory minimum term of imprisonment upon the motion of the prosecutor).

[135] *E.g.*, *Miles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995); *United States v. Pollard*, 959 F.2d 1011 (D.C.Cir. 1992).

[136] *Cf.*, *Libretti v. United States*, 516 U.S. 29 (1995)(government agreed to limit charges and make a favorable sentencing recommendation in exchange for the defendant's guilty plea and his agreement to transfer all property that would have been subject to criminal forfeiture upon his conviction).

[137] *E.g.*, 18 U.S.C. 6001-6005 (witness immunity).

[138] *E.g.*, 18 U.S.C. 3521 (witness relocation and protection).

[139] *E.g.*, 18 U.S.C. 3059 (rewards); 18 U.S.C. 3059A (rewards for crimes against financial institutions); 18 U.S.C. 3071-3077 (rewards for information relating to terrorism).

[140] "The victim has two interests in the plea bargain decision. One interest is financial: the victim is interested in restitution being imposed as part of the sentence. Thus in a charge bargain, the victim wants to insure that the defendant pleads to a charge sufficiently serious to allow restitution; and in a sentence bargain, the victim wants to advocate an award of restitution. The victim's second interest is retribution, or revenge: the victim feels he or she has been violated and that the criminal's punishment should be severe. Therefore, in a charge bargain, the victim would want the defendant to plead guilty to a serious charge, and in a sentence bargain, the victim would want a significant sentence imposed," Walling, *Victim Participation in Plea Bargains*, 65 WASHINGTON UNIVERSITY LAW QUARTERLY 301, 307-8 (1987).

and/or one that changes the legal playing field so that the victim has become the principal target of prosecution.[141]

Some state victims' rights provisions are limited to notification of the court's acceptance of a plea bargain.[142] More often, however, the states permit the victim to address the court prior to the acceptance of a negotiated guilty plea[143] or to confer with the prosecutor concerning a plea bargain.[144]

Sentencing

At common law, victims had no right to address the court before sentence was imposed upon a convicted defendant. The victim's right to bring the impact of the crime upon him to the attention of the court was one of the early goals of the victims' rights efforts. The Supreme Court has struggled with the propriety of victim impact statements in the context of capital punishment cases, ultimately concluding that they pose no necessary infringement upon the rights of the accused.[145] It is said that permitting victim impact statements serves several beneficial purposes: (1) to protect the victim's interest in having the court order the defendant to make restitution,[146] (2) to increase the possibility that the sentence imposed will reflect the damage done and therefore the seriousness of the crime,[147] (3) to balance the pleas for the defendant that have traditionally been heard at that point,[148] and (4) to restore some level of dignity and respect for the victim.[149]

Critics counter that the use of victim impact statements introduces irrelevancies into the sentencing process,[150] distorts the rationale for sentencing thereby leading to disparate results,[151] leads to putting the victim on trial,[152] and in cases where the jury determines or recommends the sentence to be imposed, may be unfairly inflammatory.[153]

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[141] *E.g.*, *The Proper Standard for Self-Defense in New York: Should* People v. Goetz *Be Viewed as Judicial Legislation or Judicial Restraint*, 39 SYRACUSE LAW REVIEW 874 (1988)(discussing prosecution of subway rider who shot the four young men he claimed attempted to rob him; Goetz was subsequently prosecuted and convicted for unlawful possession of a handgun).

[142] *E.g.*, IOWA CODE ANN. §915.13; WYO.STAT. §1-40-204.

[143] *E.g.*, R.I.GEN.LAWS §12-28-4.1(a); MO.ANN.STAT. §595.209.

[144] *E.g.*, DEL.CODE ANN. tit.11 §9405; KY.REV.STAT.ANN. §421.500.

[145] In *Booth v. Maryland*, 482 U.S. 496 (1987), the Supreme Court held that the Eighth Amendment did not permit the presentation of victim impact evidence to a sentencing jury in a death penalty case; in *Payne v. Tennessee*, 501 U.S. 808 (1991), it repudiated *Booth* and declared that victim impact statements were not inherently suspect.

[146] Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE LAW REVIEW 117, 172-3 (1984).

[147] *Id.*

[148] *Booth v. Maryland*, 482 U.S. at 520 (Scalia, J., dissenting); *Payne v. Tennessee: The Supreme Court Places its Stamp of Approval on the Use of "Victim Impact Evidence" During Capital Sentencing Proceedings*, 1992 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 841, 852.

[149] *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MISSOURI LAW REVIEW 731, 735 (1995).

[150] *Booth v. Maryland*, 482 U.S. at 502-3 (1987).

[151] *Booth v. Maryland*, 482 U.S. at 505-6; Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AMERICAN CRIMINAL LAW REVIEW 233, 259-60 (1991).

[152] *Booth v. Maryland*, 482 U.S. at 507; Berger, *Payne and Suffering – A Personal Reflection and a Victim-Centered Critique*, 20 FLORIDA STATE UNIVERSITY LAW REVIEW 21, 50 (1992).

[153] *Cf.*, *Payne v. Tennessee*, 501 U.S. at 827, and 501 U.S. at 831.

Nevertheless, one of the most prevalent of victims' rights among the states is the right to have victim impact information presented to sentencing authorities. There is, however, tremendous diversity of method among the states and federal government. Many call for inclusion in a presentencing report prepared for the court in one way or another,[154] often supplemented by a right to make some kind of subsequent presentation as federal law permits.[155] Some are specific as to the information that may be included;[156] some permit the victim to address the court directly; others do not.[157]

Reprieves and Pardons

The Constitution vests the President with "the power to grant reprieves and pardons for offences against the United States," U.S.Const. Art.II, §2, cl.1.[158] As a matter of administrative practice he is assisted by the Pardon Attorney in the Department of Justice.[159] Ordinarily, there is no hearing, public or otherwise, held to determine whether the exercise of the federal pardoning power is appropriate. Such hearings, however, are more common in the states where executive clemency is often more narrowly defined. In a few, the power is vested in a pardon board.[160] More often, the

[154] *E.g.*, F.R.Crim.P. 32(b).

[155] *E.g.*, TENN.CODE ANN. §40-35-209(b)("At the sentencing hearing, the court shall afford the parties the opportunity to be heard . . . and may afford the victim of the offense or the family of the victim the opportunity to testify relevant to the sentencing of the defendant. . .").

[156] *E.g.*, FLA.STAT.ANN. §921.143.

[157] *E.g.*, PA.STAT.ANN. tit. 18 §11.201 ("Victims of crime have the following rights: . . . (5) To have opportunity to offer prior comment on the sentencing or a defendant to include the submission of a written victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family, which statement shall be considered by the judge when determining the defendant's sentence").

[158] Blackstone in his chapter of reprieves and pardons observed that, "A reprieve . . . is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, [at the court's discretion]; either before or after judgment: as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient . . . . Reprieves may also be [from legal necessity]: as, where a woman is capitally convicted, and pleads her pregnancy; though this is not cause to stay the judgment, yet it is to respite the execution till she be delivered. . . . Another cause of regular reprieve is, if the offender become non compos, between the judgment and the award of execution: for . . . though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution . . . . If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown," IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 387-89 (1769)(transliteration provided).

[159] 28 C.F.R.§§0.35, 0.36.

[160] *E.g.*, UTAH CONST. Art. VII, §12(2)("The Board of Pardons and Parole, by majority vote and upon other conditions as provided by statute, may grant parole, remit fines, forfeitures and restitution orders, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to regulations as provided by statute").

Governor receives clemency recommendations from a pardon board.[161] Frequently, crime victims are entitled to be heard by the pardon board,[162] usually although not always as a matter of right.[163]

Past Proposals

In one form or another, past proposals gave victims the right to be heard before the accused was released on bail, before the court accepted a plea agreement, and before the court sentenced a convicted offender, and there were varying efforts to permit victim statements in parole hearings.[164] In the 106th Congress, pardon allocution appeared along with the other rights to be heard when the Senate Judiciary Committee reported out the resolution in the proposals. The Justice Department objected on the grounds that it constituted "an unprecedented incursion on the President's power to grant executive clemency requests" and in some states upon similar powers vested in the governor.[165] With the pardon component, the allocution rights in the 106th Congress proposals declared:

> *A victim . . . shall have the rights . . .*
>
> *to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence; . . . to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afford to the convicted offender*. H.J.Res. 64 (106th Cong.); S.J.Res. 3 (106th Cong.).

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[161] *E.g.*, ALA.CONST. Art.V, §124 (". . . The attorney-general, secretary of state, and state auditor shall constitute a board of pardons . . . before whom shall be laid all recommendations or petitions, for pardon, commutation, or parole, in cases of felony; and the board shall hear them in open session, and give their opinion thereon in writing to the governor, after which or on the failure of the board to advise for more than sixty days, the governor may grant or refuse the commutation, parole , or pardon, as to him seems best for the public interest. . .").

[162] *E.g.*, ALA.CODE §15-23-79(b) ("The victim shall have the right to be notified by the Board of Pardons and Paroles and allowed to be present and heard by at hearing when parole or pardon is considered. . ."); ALASKA STAT. §33.20.080(b) ("If requested by the victim of a crime against a person, a crime involving domestic violence, or arson in the first degree, the board shall send notice of an application for executive clemency submitted by the state prisoner who was convicted of that crime. The victim may comment in writing to the board on the application for executive clemency").

[163] N.D.CENT.CODE §12.1-34-02 [17]("Victims may submit a written statement for consideration by the parole board, the governor, or the pardon advisory board, if one has been appointed, prior to the parole board, the governor, or the pardon advisory board taking any action on a defendant's request for parole or pardon. Victims of violent crimes may at the discretion of the parole board, the governor, or the pardon advisory board personally appear and address the parole board, the governor or the pardon advisory board . . ."); ORE.REV.STAT. §144.650 ("Upon receiving a copy of the application for pardon, commutation or remission, any persons or agency named in subsection (1) of this section shall provide to the Governor as soon a practicable such information and records relating to the case as the Governor may request and shall provide further information and records relating to the case that the person or agency considers relevant to the issue of pardon, commutation or remission, including but not limited to: (a) statements by the victim of the crime. . .").

[164] *E.g.*, S.J.Res. 65 (104th Cong.)("Victims . . . shall have the right. . . to be heard if present and to submit a statement at a public pre-trial and trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence, to these rights at a parole proceeding to the extent they are afford to the convicted offender. . . ."); H.J.Res. 71 (105th Cong.)(". . . a victim . . . shall have the right. . . to be heard, if present, and to submit a written statement at all public proceedings, related to the crime, to determine a release from custody, an acceptance of a negotiated plea, or a sentence; to the rights described in the preceding portion of this section at a parole proceeding that is not public, to the extent those rights are afford to the convicted offender. . . .").

[165] *House Hearing III* (prepared statement of Ass't Att'y Gen. Eleanor D. Acheson); the statement later declares that "[a]lthough other provisions of the resolution would give victims' rights in proceedings in which defendants have rights, the pardon provision would grant victims' rights in a setting in which no one – including defendants – has ever possessed rights. The Framers assigned this power to the President, and we oppose any amendment that would encroach upon it," *id.*

> *to . . . an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence*. S.J.Res. 3 (106th Cong.) (as reported).

Amendment in the 108th Congress

> *SECTION 2. A victim of violent crime shall have the right to . . . reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings*
>
> *SECTION 4. . . .Nothing in this article shall affect the President's authority to grant reprieves or pardons*

Section 2 has been substantially rewritten. The differences are apparent. The reasonableness element which attached to the pardon rights has been added to the others. References to parole proceedings and convict-equivalent rights have disappeared, and a reference to reprieves has surfaced in their place. The right to be heard and make a statement on conditional release, plea and sentence has been replaced with the simple right to be heard on release, plea and sentence. The right to make a statement concerning any proposed pardon or commutation of a sentence has become the right to be heard at public reprieve and pardon proceedings.

Past offerings spoke of a reasonableness element in the right to be heard only with respect to matters of pardon and commutation ("to reasonable notice of and an opportunity to submit a statement concerning"). The explanation of reasonableness in that context was brief:

> The President, Governors, and clemency boards are also free to determine the appropriate way in [which] a victim's statement will be considered as part of the process. The fact that a victim objects to (or supports) a clemency application is not dispositive. Instead, the information provided by the victim will be considered along with other relevant information to aid the decisionmaker in making the difficult clemency decision. S.Rept. 106-254 at 35.

Written large across every stage of the criminal justice process, the reasonableness element seems to make the victim's views relevant but not dispositive. The same message may be found in the distillation of the right to be heard and submit a statement down to the right to be heard.[166] This reasonableness element may also give the courts and administrators greater discretion over the circumstances under which the right is accommodated than would be possible in the form of a restriction permitted by the last sentence in section 2 of the Amendment ("These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity").

The reasonableness element may play a role in another matter. The right to be notified is limited to public proceedings "involving the crime." The right not to be excluded is likewise limited to "such public proceedings [involving the crime]." The right to be heard suffers no such limitation, at least not facially. Once a victim-offender nexus exists, a court might conclude that it was reasonable for a victim to be heard with regard to the release, plea bargain, sentence, or pardon issues involving the offender, or even a potential witness, on charges otherwise totally unrelated to the victim.

One hearing witness, however, foresaw the prospect of an opposite, more narrow, interpretation as a result of the changes. In his view, elimination of the reference to the right to make a statement in favor of a simple right to be heard runs the risk that the courts will understand this as

[166] In earlier versions, the right to "be heard" and "to submit a statement" in each of several kinds of proceedings could have been construed as the right to communicate (right to submit a statement) and the right to have the communication carry determinative weight (the right to be heard).

a right to make an oral statement before the tribunal.[167] Even under a standard of reasonableness, this might lead to substantial administrative inconvenience.[168]

At its most literal construction, the Amendment is likely to convey greater rights than victims enjoy in many, if not most, jurisdictions.

Public Release Proceedings

Proposals once conveyed a right to be heard at public proceedings relating to a *conditional* release from custody and, to the extent the inmate enjoyed a right to be heard, at closed parole hearings. The Amendment simply conveys a right to be heard at public release proceedings. The clear implication is that under the Amendment victims have no right to be heard at closed parole hearings, regardless of whether the inmate has a right to be heard.[169]

On the other hand, the new formulation may open a wider range of proceedings to victim allocution. There was always some ambiguity over whether conditional release proceedings meant proceedings where release might be granted if certain conditions were met *before* release or proceedings where release bound the accused or convicted offender to honor certain conditions *after* release, or both. In any event, in bygone proposals the Senate Judiciary Committee read "conditional" in the phrase "*conditional* release *from custody*," as a word of limitation:

> The amendment extends the right to be heard to proceedings determining a '*conditional* release' from custody. This phrase encompasses, for example, hearings to determine any pretrial or posttrial release (including comparable releases during or after an appeal) on bail, personal recognizance, to the custody of a third person, or under any other conditions, including pretrial diversion programs. Other examples of conditional release include work release and home detention. Its also includes parole hearings or their functional equivalent, both because parole hearings have some discretion in releasing offenders and because releases from prison are typically subject to various conditions such as continued good behavior. It would also include a release from a secure mental facility for a criminal defendant or one acquitted on the grounds of insanity. A victim would not have a right to speak, by virtue of this amendment, at a hearing to determine "unconditional" release. For

[167] *Senate Hearing V*; *House Hearing V* at 79 (statement of James Orenstein)("I would expect courts to interpret the deletion of 'submit a statement' to signal a legislative intent to allow victims actually to be 'heard' by making an oral statement. Nor do I think the use of the term 'reasonably to be heard' would alter that interpretation; instead, I believe courts would likely reconcile the two changes by interpreting 'reasonably' to mean that a victim's oral statement could be subjected to reasonable time and subject matter restrictions"); see also, *Senate Hearing IV* at 122; *House Hearing IV* at 50.

[168] *Id.* If . . . correct then prison officials might face an extremely burdensome choice of either transporting incarcerated victims to court for the purpose of being heard or providing for live transmissions to the courtroom.
"A related problem would extend beyond prison walls. Because the difference between the previous and current versions of the Amendment suggest that a victim must be allowed specifically to be 'heard' rather than simply to 'submit a statement,' a victim might persuade a court that the 'reasonable opportunity to be heard' guaranteed by the current version of the Amendment carries with it an implicit guarantee that the government will take affirmative steps, if necessary, to accord such a reasonable opportunity. This undermines the intent of the Amendment's careful use of negative phrasing with respect to the right not be excluded from public proceedings – a formulation designed to avoid a 'government obligation to provide funding, to schedule the timing of a particular proceeding according to a victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings.' Further undermining that intent is the fact that unlike its predecessor, the current version of the Amendment does not include the phrase 'if present' in the specification of the right to be heard").

[169] *Cf., Senate Hearing V; House Hearing V* at 35 (statement of Steven T. Twist)("The right would also extend to post-conviction public release proceedings, for example parole or conditional release hearings. Jurisdictions that have abolished parole in favor of truth in sentencing regimes may still have conditional release. Only if the jurisdiction also has a 'public proceeding' prior to such a conditional release would the right attach"); see also, *Senate Hearing IV* at 186-87; *House Hearing IV* at 22 (statement of Steven T. Twist).

> example, a victim could not claim a right to be heard at a hearing to determine the jurisdiction of the court or compliance with the governing statute of limitations, even though a finding in favor of the defendant on these points might indirectly and ultimately lead to the 'release' of the defendant. Similarly, there is no right to be heard when a prisoner is released after serving the statutory maximum penalty, or the full term of his sentence. There would be proceeding to "determine" a release in such situations and the release would also be without condition if the court's authority over the prisoner had expired. S.Rept. 106-254 at 32; S.Rept. 105-409 at 27.

Thus by removing the words "conditional" and "from custody," the Amendment perhaps should be understood to allow victims the right to be heard on most pre-trial motions as well as most post-trial appeals and petitions, or at least any that might result in a release of the accused or the convicted offender from jeopardy. For example, it might support an argument that the Amendment gives victims the right be heard at trial by the trier of fact (judge or jury) on whether the defendant should or should not be convicted on any of the charges at issue, *i.e.*, at least limited trial participation.

The Amendment affords the right only to a reasonable extent ("A victim . . . shall have the right to . . . *reasonably* to be heard at public release, plea, sentencing, reprieve, and pardon proceedings . . ."). In other contexts, the Amendment's reasonableness demands are standards of circumstance. What is reasonable is likely to depend upon the circumstances of individual cases, a limitation of unknown implications.

The Amendment even if conservatively read represents an expansion of victims' rights in most jurisdictions. Its promise of the right to be heard in release proceedings in particular is more generous than most, although victims' rights to have their interests considered, to be notified, to attend, and in some instances to make presentations at bail proceedings appear more frequently in state statutes and court rules than was once the case.

Plea Bargains

The Amendment assures crime victims of the right to reasonably be heard at proceedings where a plea bargain is accepted. The right only attaches to the acceptance of plea bargains in open court (*i.e.*, at public proceedings).[170] The right clearly does not vest a victim with the right to participate in plea negotiations between the defendant and the prosecutor, which are neither public nor proceedings. By the same token, the right to be heard is not the right to decide; victims must be heard, but their views are not necessarily controlling.[171] It remains to be seen whether the existence of the right in open court will lead to more proceedings being closed to avoid the complications of recognizing the right.

[170] The Senate committee reports, on the question of when public hearings might be closed thus removing the trigger for the rights under earlier proposals, opined that, "while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses," S.Rept. 108-191 at 34; S.Rept. 106-254 at 30; S.Rept. 105-409 at 25.

[171] S.Rept. 108-191 at 36 ("Victims have no right to 'veto' any release decision by a court, rather simply to provide relevant information that the court can consider in making its determination about release"); see also, *Senate Hearing IV; House Hearing IV* at 22-3 (statement of Steven J. Twist), quoting S.Rept. 106-254 at 33("the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea").

Sentencing

The Amendment guarantees crime victims the right to reasonably be heard at public sentencing proceedings. The language of the Amendment does not specify what form may or must be used nor does it speak to permissible restrictions on length, content or other limitations that may come within the rule of reason. Neither does it expressly identify any limitation activated by a conflict with rights of the defendant. Drafters may envision a legislative definition of these limitations, but the Amendment may confine such efforts to those marked by "a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." The right to reasonably be heard may come to be understood to mean the right to be heard under conditions and circumstances where the right is weighed against judicial and administrative convenience or conflicting defendant interests.

The Senate Judiciary Committee, however, has continuous described this and similar language as somewhat more "victim-friendly." It has noted the language's dual function of giving sentencing authorities more complete information and of providing victims with "a powerful catharsis," S.Rept. 108-191 at 37; S.Rept. 106-254 at 33; S.Rept. 105-409 at 28. In light of this second purpose, "a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence," *Id*. In previous reports, the Senate Judiciary Committee added immediately thereafter that Congress and the states would nevertheless have the prerogative to limit victim statements to relevant testimony, to define relevancy as they chose, and to otherwise limit the length and content of victims' statements.[172] The Committee's description of the clause in the 108th Congress is much more restrained, more reminiscent of existing law:

> State and Federal statutes already frequently provide allocution rights to victims. The Federal amendment wold help to insure that these rights are fully protected. The result is to enshrine and perhaps extend the Supreme Court's decision in *Payne v. Tennessee*, 502 U.S. 808 (1991), recognizing the propriety of victim allocution in capital proceedings. Victim impact statements concerning the character of the victim and the impact of the crime remain constitutional. The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence . . . . The victim's right is to be "heard." The right to make an oral statement is conditioned on the victim's presence in the courtroom. As discussed above, it does not confer on victims a right to have the government transport them to the relevant proceeding. Nor does it give victims any right to "filibuster" any hearing. As with defendants' existing rights to be heard, a court may set reasonable limits on the length of statements, but should not require the victim to submit a statement for approval before it is offered. No such requirement is put on the defendant and none should b imposed on the victim. The Due Process clause requires that the victim's

[172] "Congress and the states remain free to set certain limits on what is relevant victim impact testimony. For example, a jurisdiction might determine that a victim's views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding. *Cf., Robison v. Maynard*, 943 F.2d 1216 (10th Cir. 1991) (concluding that victim opinion on death penalty not admissible). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence. . . . Nor does [the victims' right] give victims any right to 'filibuster' any hearing. As with defendant's existing rights to be heard, a court may set reasonable limits on the length and content of statements," S.Rept. 106-254 at 33-4; S.Rept. 105-409 at 28-9.
Robison held that the opinion of a murder victim's family that the defendant should not be sentenced to death was not relevant mitigating evidence because it did "not relate to the harm caused by the defendant," 943 F.2d at 1218.
At the time the reports were written, the Committee knew that federal prosecutors in the Oklahoma City bombing case had advised the families of victims that they could not be heard at sentencing if they were opposed to imposition of the death penalty as a matter of principle, *Senate Hearing* at 71-2 (statement of Marsha A. Kight).

> statement not be "unduly prejudicial." At the same time, victims should always be given the power to determine the form of the statement. . . .
>
> Even if not present, the victim is entitled to submit a statement at the specified hearing for the consideration of the court. The Committee does not intend that the right to be heard be limited to "written" statements, because the victim may wish to communicate in other appropriate ways. S.Rept. 108-191 at 38 (most internal citations omitted).

Reprieves and Pardons

Section 4 seems to limit the Amendment's impact on federal pardons ("Nothing in this article shall affect the President's authority to grant reprieves or pardons"). The Amendment is likely to have little impact on federal practice, in any event since the federal pardon process does not involve "public proceedings," and therefore victims will continue to have no right to be heard with respect to a requested or contemplated federal pardon. On the other hand, its impact on the states would vary according to the extent to which public proceedings are part of the pardon process.

Victim Safety

The Amendment identifies three victims' interests that adjudicative decision makers must take into consideration: victim safety, avoiding unreasonable delay, and just restitution pursued in a timely manner. The legislative history to date may be read to indicate that the drafters understood the right to attach to decisions made by judicial and administrative authorities in any adversarial setting. Victims' interests must be considered, but are not necessarily controlling.

In the case of victim safety, the decision whether to release an accused on bail and the conditions to be imposed upon release represent perhaps the obvious example of decisions where victims' safety must be considered. The right does not attach if the decision to release the offender is simply a matter of administrative discretion exercised without the necessity of an adversarial proceeding. Thus, the right only attaches – with respect to release of an offender following full service of his or her sentence, or on furlough, or work release, or assignment to a half-way house, or following civil commitment – if the jurisdiction provides for release pursuant to an adversarial proceeding. The right does not attach, for instance, to release pursuant to a presidential pardon that features no such proceedings. The range of proceedings where the right applies may be broader than past proposals envisioned since they were limited to decisions concerning "conditional release."

Contemporary Practices

Victim safety is generally recognized as a valid, and in some jurisdictions a required, pre-trial release consideration.[173] It is mentioned far less frequently as a consideration in post-conviction (probation, work release, parole, pardon) or non-criminal release (release from civil commitment

[173] *E.g.*, TEX.CRIM.PRO.CODE art.56.02(a)(2)("A victim . . . is entitled to . . . the right to have the magistrate taken the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused"); ORE.CONST. Art.I, §43(1)(b)(". . . the following rights are hereby granted to victims . . .The right to have decisions by the court regarding the pretrial release of a criminal defendant based upon the principle of reasonable protection of the victim and the public, as well as the likelihood that the criminal defendant will appear for trial. . ."). *cf.*, 42 U.S.C. 10606(b)(2)("A crime victim has . . . the right to be reasonably protected from the accused offender").

or juvenile custody) determinations, although public safety may be a factor in many of these instances.[174]

Past Proposals

Three of the proposals in the 104th Congress assured victims of the right to "receive reasonable protection from physical harm or intimidation relating to the proceedings."[175] Each of the others prior to the 107th Congress assured victims that their safety would be considered before conditionally releasing an accused from custody:[176]

> *A victim . . . shall have the right[] . . . to consideration for the safety of the victim in determining any conditional release from custody relating to the crime*. H.J.Res. 64 (106th Cong.); S.J.Res. 3 (106th Cong.).

Amendment in the 108th Congress

> *SECTION 2. A victim of violent crime shall have . . . the right to adjudicative decisions that duly consider the victim's safety.*

The language here is new but many of the concepts are not. The change of the context within which victim safety must be considered – from "determinations" of "conditional release" to "adjudicative decisions" – seems to reflect both expansion and contraction. The term "adjudicative decisions" conveys the sense of judicial determinations, of decisions made by a tribunal following an adversarial process. Definitely more confined than "determinations." On the other hand, removal of the qualifying "conditional release" phrase, seems to extend the right far beyond the pre-trial release context which that phrase might at first imply.

The testimony of witnesses at congressional hearings may confirm that the term "adjudicative decisions" is understood to mean "both court decisions and decisions reached by adjudicative bodies, such as parole boards. Any decision reached after a proceeding in which different sides of an issue would be presented would be an adjudicative decision."[177] Thus, determinations like federal pardon decisions that fell within the reach of the proposals in earlier Congresses appear beyond the reach of the Amendment, as long as they involve administrative and executive determinations rather than adjudications.

The Senate Judiciary Committee meant the right in earlier proposals to apply broadly not only to pre-trial release determinations in criminal cases but to determinations relating to civil commitment and post-conviction determinations as well.[178] Thus, the elimination of the

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[174] *E.g.*, DEL.CODE ANN. tit.11 §4347(c)("A parole may be granted when in the opinion of the Board there is reasonable probability that the person can be released without detriment to the community or to person. . .").

[175] H.J.Res. 173 (104th Cong.); H.J.Res. 174 (104th Cong.); S.J.Res. 52. (104th Cong.).

[176] H.J.Res. 64 (106th Cong.); S.J.Res. 3 (106th Cong.)(same); S.J.Res. 65 (104th Cong.)(right "to have the safety of the victim considered in determining a release from custody"); S.J.Res. 6 (105th Cong.)(same); S.J.Res. 44 (105th Cong.)(same); H.J.Res. 71 (105th Cong.)(same); H.J.Res. 129 (105th Cong.)(same).

[177] *Senate Hearing IV* at 193; *House Hearing IV* at 25 (statement of Steven J. Twist); *Senate Hearing IV* at 124; *House Hearing IV* at 51(statement of James Orenstein)("any adjudicative decision that a court (or presumably, a parole or pardon board) makes . . .").

[178] S.Rept. 108-191 at 39 ("This right requires judges, magistrates, parole boards, and other such officials to consider the safety of the victim in determining any conditional release. As with the right to be heard on conditional releases, this right will extend to hearings to determine any pretrial or post-trial release on bail, personal recognizance, to the custody of a third person, on work release, to home detention, or under any other conditions as well as parole hearings or their functional equivalent. . . Custody here includes mental health facilities. This is especially important as sex offenders are frequently placed in treatment facilities, following or in lieu of prison"); see also, S.Rept. 106-254 at 37-

"conditional release" qualifications of past proposals may be less significant than might appear simply on the face of the proposals and the Amendment. Nevertheless, it does represent the elimination of a restriction. Victim safety, for example, may come to play a role in the permissible constraints placed upon the accused during the course of a trial.

What of the relative weight to be given victim safety? The phrase, "duly considered" or "due consideration" is probably less generous than "considered" or "consideration." BLACK'S defines "due consideration" as the "degree of attention properly paid to something, *as the circumstances merit*."[179] The courts have construed the phrase "duly consider" in the context of various local federal court rules of criminal procedure. There the court's obligation to "duly consider" a request for a redacted docket in proceedings ancillary to a grand jury investigation demands consideration and an explanation if the request is denied.[180] Even before the addition of the "duly" limitation, victim safety was not thought to constitute either a dispositive or necessarily a weighty factor, it was simply a factor.[181] And so it presumably remains.

Speedy Trial

The second of the victims' interests that must be considered by at least some decision makers is consideration of the victim's interest in avoiding unreasonable delay. Some have expressed the concern that this vests victims with the right to be heard on scheduling decisions and consequently the right to notification and appearance at proceedings where such matters are raised. The concern may be unfounded in light of the Amendment's specific references to points of attachment for a victim's right to notice, not to be excluded, and to be heard. The legislative history suggests that perhaps the standards used to judge the defendant's constitutional right to a speedy trial govern here as well.

Contemporary Practices

The United States Constitution guarantees those accused of a federal crime a speedy trial;[182] the due process clause of the Fourteenth Amendment makes the right binding upon the states,[183] whose constitutions often have a companion provision.[184] The constitutional right is reinforced by statute and rule in the form of speedy trial laws in both the state and federal realms.[185]

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[179] BLACK'S LAW DICTIONARY, 516 (7th ed.1999) (emphasis added); *see also, Weisgram v. Marley Co.*, 528 U.S. 440, 443-44 (2000)(noting that the circumstances of an individual case determine whether the *due consideration* to which a trial court's views are entitled permits a federal appellate court to enter a judgment in favor of a party against whom a verdict has been returned and sustained below).

[180] *In re Sealed Case (Dow Jones)*, 199 F.3d 522, 527 (D.C.Cir. 2000).

[181] S.Rept. 108-191 at 39 ("At such [release] hearings, the decisionmaker must give consideration to the safety of the victim in determining whether to release a defendant and, if so, whether to impose various conditions on that release to help protect the victim's safety. . . . This right does not require the decisionmaker to agree with any conditions that the victim might propose (or, for that matter to agree with a victim that defendant should be released unconditionally) . . . . This right simply guarantees victim input into a process that has been constitutionally validated"); see also, S.Rept. 106-254 at 38.

[182] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S.Const. Amend. VI.

[183] *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

[184] *E.g.*, R.I.CONST. art.1, §10; S.C.CONST. art.I, §14.

[185] *E.g.*, *State:* CONN.SUPER.CT.R. §§956B to 956F; DEL.SUPER.CT.CRIM.R. 48 (b); FLA.R. CRIM.P. 3.191; GA.CODE ANN. §§17-7-170 to 17-7-171. *Federal:* 18 U.S.C. 3161-3174.

"Ironically, however, the defendant is often the only person involved in a criminal proceeding without an interest in a prompt trial. Delay often works to the defendant's advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, changes in the law may be beneficial, or the case may simply receive a lower priority with the passage of time."[186]

Until recently, victims had no comparable rights, although their advocates contended they had a very real interest in prompt disposition. Some victims sought to put a traumatic episode behind them; some wanted to see justice done quickly; some hoped simply to end the trail of inconveniences and hardship that all too often fell to their lot as witnesses.[187]

A few states have since enacted statutory or constitutional provisions establishing a victim's right to "prompt" or "timely" disposition of the case in one form or another.[188] The federal statutory victims' bill of rights, 42 U.S.C. 10606, does not include a speedy trial provision, but Congress has encouraged the states to include a right to a reasonably expeditious trial among the rights they afford victims.[189]

Past Proposals

In the beginning, proposals sometimes spoke of a victims' *speedy trial* right,[190] and in other instances preferred to describe it as the right to have "*proceedings* resolved in a prompt and timely manner."[191] Proposals in the 105th Congress continued the split, some focused on the beginning and completion of trial; others on a finality of the proceedings.[192] In the following Congress, the proposals all called for "consideration of the victim's interest in a *trial* free from unreasonable delay."[193] In this form, the right was one relevant only in a trial and pre-trial context. The proposals seemed to carry the implication that the right could only be claimed in conjunction with other proceedings (*e.g.,* "considered" in the context of a defense or government motion for a continuance but not a defendant's motion for a new trial), but not necessarily providing grounds for a free standing victim's motion when the question of timing was not otherwise before the court:

> *A victim . . . shall have the right[] . . . to consideration of the interest of the victim that any trial be free from unreasonable delay*. S.J.Res. 3 (106th Cong.); H.J.Res. 64 (106th Cong.).

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[186] Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH LAW REVIEW 1373, 140.

[187] *E.g.*, Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPPERDINE LAW REVIEW 15, 19-20 (1984); *contra*, Henderson, *The Wrongs of Victim's Rights*, 37 STANFORD LAW REVIEW 937, 974-77 (1985).

[188] *E.g.* LA.REV.STAT.ANN. §46:1844 [J.] ("The victim shall have the right to a speedy disposition and prompt and final conclusion of the case after conviction and sentencing"); N.H.REV.STAT.ANN. §21-M:8-k.

[189] 42 U.S.C. 10606 nt. ("It is the sense of Congress that the States should make every effort to adopt the following goals of the Victims of Crime Bill of Rights: . . . (4) Victims of crime should have the right to a reasonable assurance that the accused will be tried in an expeditious manner").

[190] "H.J.Res. 174 (104th Cong.) ("the victim shall have the following rights: . . . to a speedy trial, a final conclusion free from unreasonable delay. . ."); S.J.Res. 52 (104th Cong.)(same).

[191] H.J.Res. 173 (104th Cong.) ("any victim shall have the right . . . to have the proceedings resolved in a prompt and timely manner"); S.J.Res. 65 (104th Cong.)("Victims . . . shall have the rights . . . to a final disposition free form unreasonable delay").

[192] S.J.Res. 44 (105th Cong.)("Each victim . . . shall have the rights. . .to consideration for the interest of the victim in *a trial* free from unreasonable delay"); H.J.Res. 129 (105th Cong.)(same); S.J.Res. 6 (105th Cong.) ("Each victim . . . shall have the rights . . .to a *final disposition of the proceedings* relating to the crime free from unreasonable delay"); H.J.Res. 71 (105th Cong.) (" . . . a victim . . . shall have the right . . .to seek relief from an unreasonable delay of the *final disposition of the proceedings* relating to the crime") (emphasis added in each instance).

[193] H.J.Res. 64 (106th Cong); S.J.Res. 3(106th Cong.).

Amendment in the 108th Congress

> *SECTION 2. A victim of violent crime shall have . . . the right to adjudicative decisions that duly consider the victim's . . . interest in avoiding unreasonable delay*

Some of the words are new. The phrase "adjudicative decisions" has replaced "trials" and "proceedings"; "duly consider" appears instead of "consideration;" and "avoiding unreasonable delay" stands where "free from unreasonable delay" once was. Yet at least some of the concepts seem to have remanded constant. Reasonable delays must be countenanced; unreasonable delays tolerated only if they are outweighed by other interests. On the other hand, the term "adjudicative decisions" appears clearly more inclusive than "trials" and although it carries judicial coloring perhaps it is not much different than "proceedings" except that there is no literal requirement that the adjudications be public. However, since only victims may assert their rights, section 3, and since victims are entitled to heard only at public proceedings, section 2, the Amendment's authors may have intended the adjudications at which victims' interests must be considered to be limited to public proceedings.

At least one Congressional witness has concluded that "[a]s used in this clause, 'adjudicative decisions' includes both court decisions and decisions reached by adjudicative bodies, such as parole boards. Any decision reached after a proceeding in which different sides of an issue would be presented would be an adjudicative decision," *House Hearing V* at 42 (statement of Steven J. Twist); see also, *Senate Hearing IV* at 193; *House Hearing IV* at 25.

So the decisions of state and federal tribunals must involve consideration of the interests that victims have in avoiding unreasonable delay. That still leaves several questions unanswered. Does it mean that victims have a right to be heard prior to any decision that might either cause or reduce delay? Another hearing witness expressed concern that the right to consideration of the interest might include the right to voice the interest: "Does a crime victim have the right to object to the admission of evidence on the ground that it might lengthen the trial?" *House Hearing V* at 81 (statement of James Orenstein). The Amendment's language does not necessarily create a right to assert the interest. This interest triggers a right to consideration. Other interests trigger a right to be heard. Courts might conclude the difference is significant.

Or they may conclude that the victim has a right to be heard on the admissibility of evidence, not because of his or her interest in avoiding unreasonable delay but because of his or her right to be heard at "public release proceedings," as noted earlier. It may be considered significant that neither the government nor the defendant may be allowed to bring the victim's interest to the attention of the tribunal, since in the words of the Amendment elsewhere, "[o]nly the victim or the victim's lawful representative may assert the right established by this article."

Does a victim always have a recognizable interest in avoiding all unreasonable delay or only in those unreasonable delays that do more than simply offend the victim? Does a victim only have an interest entitled to due consideration when the victim suffers some disadvantage because of the unreasonable delay? The answers may lie in what the courts consider unreasonable delay. In earlier versions, it has been suggested that the test for reasonableness rests in the Supreme Court's speedy trial jurisprudence which weighs the "length of delay, reasons for the delay, defendant's assertion of his right, and prejudice to the defendant."[194] The Senate Judiciary Committee continued to endorse that view in the 108th Congress, "In determining what delay is

[194] S.Rept. 105-409 at 31 ("In determining what delay is 'unreasonable,' the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial"); *accord*, S.Rept. 106-254 at 36-7; *Barker v. Wingo*, 407 U.S. 514, 530 (1972)(speedy trial); *United States v. $8,850*, 461 U.S. 555, 564 (due process concerning delays between the seizure of property and the initiation of in rem forfeiture proceedings).

'unreasonable,' the court can look to the precedents that exist interpreting a defendant's right to a speedy trial, S.Rept. 108-191 at 40.

Restitution

The third victim interest entitled to consideration under some circumstances involves consideration of restitution claims. The Amendment is very different from past proposals. It does not establish a right to restitution in so many words. It does not explicit convey a right to have proceedings reopened for failure to accommodate a victim's right to restitution. Instead for the first time it speaks of just and timely claims to restitution, two concepts which could be subject to several interpretations.

Contemporary Practices

Every jurisdiction authorizes its courts to order convicted defendants to pay victim restitution.[195] Each jurisdiction, however, addresses distinctly questions of when if ever restitution is mandatory; the extent to which restitution orders are properly subject to plea agreements; whether restitution is available for injuries caused by acts of juvenile delinquency; which victims are entitled to restitution; what priority, if any, restitution takes over forfeiture of the defendant's assets or his payment of criminal fines; and more.[196]

Past Proposals

The first victims' rights proposals promised either a right "to an order of restitution from the convicted offender,"[197] or a right "to full restitution from the convicted offender."[198] Subsequent proposals opted for the right to an order version.[199] The proposals appeared to make restitution orders mandatory as a matter of right. The scope of the right was unstated. Although the proposals applied to juvenile proceedings, the use of the term "convicted offender" might have been construed to limit their restitution command to criminal convictions and therefore not reach findings of delinquency.[200]

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[195] App. IV, *Victims' Rights Amendment: Background & Issues Associated with Proposals to Amend the United States Constitution*, CRS Report 97-735 (2000).

[196] *See generally, Measure and Elements of Restitution to Which Victim Is Entitled Under State Criminal Statute*, 15 ALR5TH 391 (1993 & 2001 Supp.).

[197] S.J.Res. 65 (104th Cong.); H.J.Res. 173 (104th Cong.)(the right "to have the court order restitution from the defendant upon conviction").

[198] H.J.Res. 174 (104th Cong.); S.J.Res. 52 (104th Cong.).

[199] H.J.Res. 71 (105th Cong.)(the right "to an order of restitution from the convicted offender"); H.J.Res. 129 (105th Cong.)(same); S.J.Res. 6 (105th Cong.)(same); S.J.Res. 44 (105th Cong.)(same); H.J.Res. 64 (106th Cong.)(same); S.J.Res. 3 (106th Cong.)(same).

[200] This construction might have drawn some support from the observation in the Senate report that with respect to this language in an earlier proposal, "[t]he right is, of course, limited to 'convicted' defendants, that is, those who pled guilty, are found guilty, or enter a plea of no contest," S.Rept. 105-409 at 32. Unless they are prosecuted as adults, juveniles do not plead guilty, are not found guilty, nor do they enter nolo pleas. They confess to being or are found delinquent, or in need of supervision, or neglected, but they are not convicted. The Committee also declared that it had "previously explained [its] philosophy in some detail in connection with the Mandatory Victim Restitution Act, codified at 18 U.S.C. §§3663A and 3664, and *intends that this right operate in a similar fashion*," S.Rept. 105-409 at 31 (emphasis added). Even though the Mandatory Victim Restitution Act applies to juveniles tried and convicted as adults, it does *not* apply to findings of delinquency or other dispositions following juvenile proceedings.

Restitution orders in a nominal amount or subject to priorities for criminal fines or forfeiture or other claims against the defendant's assets might have seemed inconsistent with the decision to elevate mandatory victim restitution to a constitutional right. Yet the Senate reports concluded that the proposal did "not confer on victims any rights to a specific amount of restitution, leaving the court free to order nominal restitution . . . . The right conferred on victims [was] one to an 'order' of restitution. With the order in hand, questions of enforcement of the order and its priority as against other judgments [were] left to the applicable Federal and State law," S.Rept. 106-254 at 37; S.Rept. 105-409 at 31.

The Senate reports, however, have continuously suggested that the right might include the right to a pre-trial restraining order to prevent an accused from dissipating assets that might be used to satisfy a restitution order, S.Rept. 108-191 at 41; S.Rept. 106-254 at 37; S.Rept. 105-409 at 32. The right also might have extended to prevent dissipation in the form of payment of attorneys' fees for the accused, since the accused has only a qualified right to the assistance of counsel of his choice.[201]

Proposals in the 106th Congress provided:

> *A victim . . . shall have the right[] . . . to an order of restitution from the convicted offender.* S.J.Res. 3 (106th Cong.); H.J.Res. 64 (106th Cong.).

Amendment in the 108th Congress

> *SECTION 2. A victim of violent crime shall have . . . the right to adjudicative decisions that duly consider the victim's . . . interest in . . . just and timely claims to restitution from the offender*

This appears to be a fairly dramatic withdrawal from the position taken in the proposals of other Congresses. What was a right to a restitution order has become the right to consideration of just and timely victims' claims, appropriate to the circumstances, weighed against the interests of others, and perhaps only applicable during proceedings on other matters. As long as the victim's interest in just restitution when asserted in a timely manner is recognized, the Amendment might appear to leave the law of restitution unchanged. In those jurisdictions where restitution is discretionary rather than a matter of right, a victim's interest in restitution appears to be a factor that must be considered – not a controlling factor, simply a factor.

Others see the language differently. Speaking of this portion of the Amendment, one commentator offered an example to illustrate its reach:

> Jane Doe was beaten and raped in a remote wooded area of Vermont. . . . Her injuries were extensive. . . . When her case was resolved by way of a plea bargain she was not given the right to speak before the court. Incredibly, the sentence imposed did not order the criminal to pay restitution. Today he earns $7.50 an hour making furniture inside the prison walls – and none of it goes to her for her damages and injuries because it was not part of the criminal sentence. If this provision had been the law, Jane would today be receiving restitution payments each month. *House Hearing IV* at 27 (statement of Steven J. Twist).

The implication is that in horrific cases, victims have a right to restitution without reference to any other factors. Yet insertion of the word "just" for the first time in the restitution component of

[201] *Wheat v. United States*, 486 U.S. 153, 159 (1988); *United States v. Monsanto*, 491 U.S. 600, 616 (1989)("if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial").

the Amendment presumably calls for consideration of such factors when appropriate. Moreover, it probably precludes restitution claims by the "ripped-off" drug dealer or others victimized in the course of their own illegal conduct at least in some circumstances.[202]

Past proposals explicitly allowed victims to reopen final proceedings in vindication of their right to restitution. That language is gone and in its place is a reference to "timely" claims to restitution. The implications are obvious, but the statement quoted above seems to suggest that "timeliness" may be judged by the date of the injury, the date of sentencing, or the date on which the offender has the resources to begin paying restitution ("Today [the offender] earns $7.50 an hour making furniture inside the prison walls – and none of it goes to her for her damages and injuries because it was not part of the criminal sentence. If this provision had been the law, Jane would today be receiving restitution payments each month").

Legislative Authority

Section 4 vests Congress with the power to enforce the Amendment through appropriate legislation. In addition, the legislative history points out that, subject to Congress' pre-emptive legislative prerogatives, the state legislatures share with Congress the authority within their own domains to restrict victims' rights in the name of a substantial interest in public safety or the administration of criminal justice or in response to a compelling necessity. They also continue to enjoy fundamental authority to outlaw new forms of misconduct. It is somewhat unclear whether they may legalize conduct which they had outlawed when the Amendment went into effect. For example, does the Amendment permit a state that outlaws solicitation of various violent crimes to reduce the extent of its basic victims' rights coverage by repealing its proscription on solicitation – other than for purposes of public safety, the administration of criminal justice or compelling necessity? Neither the language of the Amendment nor its legislative history seem to provide any clear answer.

Contemporary Practices

The grant of legislative implementing authority may shield against the appearance of the unexpected and undesirable consequences discovered after ratification of a constitutional amendment. The difficulty of amending the Constitution argues for a legislative safety valve. Of course, this argument loses considerable force when one of the principal reasons for enacting a constitutional amendment rather than merely enacting a statute is to ensure that the rights it grants are not easily denied or diluted.

One of the perils implicit in opting for extensive legislative powers is the prospect of unfulfilled promises. It is certainly possible to draft a generally worded constitutional amendment in anticipation of future legislative refinements. And these may be forthcoming. But it may also happen that the refinements must be laboriously crafted through the courts because legislative resolution proves either unattainable or less than universally appealing.

[202] *Compare*, *United States v. Martinez*, 978 F.Supp. 1442 (D.N.Mex. 1997)(refusing to issue mandatory restitution order for the benefit of illegal Indian casino which had been the victim of an armed robbery), *with, United States v. Bonetti*, 277 F.3d 441 (4th Cir. 2002)(holding that an illegal immigrant was entitled to restitution from those who harbored her under abusive conditions).

Past Proposals

Early proposals granted Congress and the state legislatures the power to enact implementing legislation within their respective jurisdictions.[203] Over time, some of the proposals began to expand the explicit legislative authority of Congress[204] and then to constrict the explicit legislative authority of the states.[205]

The Senate report in the 105th Congress explained, however, that the loss of state legislative authority was less sweeping than it might have appeared. It asserts that the power to define the class of victims to whom the proposal would apply was by implication to be shared by Congress and the states.[206] Subject to preemptive federal legislation, the states were to be permitted to paint the scope of the amendment as broadly and perhaps as narrowly as they chose.[207] Some Committee members were troubled by this resolution;[208] some skeptical that it could hold sway.[209]

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[203] *E.g.*, S.J.Res. 52 (104th Cong.)("The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to enforce this article by appropriate legislation"); H.J.Res. 71 (105th Cong.)("The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required by public interest").

[204] S.J.Res. 6 ("The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases") ("Each victim of a crime of violence and *other crimes that Congress may define by law*, shall have the rights to . . . .")(emphasis added) ("The rights established by this article shall apply in . . . military proceedings *to the extent that Congress may provide by law* . . . .")(emphasis added).

[205] S.J.Res. 44 ("The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest"). H.J.Res. 129 ("The Congress shall have the power to enforce this article by appropriate legislation"). The questions involving impact on the states are less vexing in the case of H.J.Res. 129 which only applies to federal proceedings ("The rights established by this article shall apply in all Federal proceedings. . . .").

[206] S.Rept. 105-409 at 23 ("The Committee anticipates that Congress will quickly pass an implementing statute defining 'victim' for Federal proceedings. Moreover, nothing removes from the states their plenary authority to enact definitional laws for purposes of their own criminal system. . . . Since the legislatures define what is criminal conduct, it makes equal sense for them to also have the ability to further refine the definition of 'victim'").

[207] S.Rept. 105-409 at 35 ("This provision is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to 'enforce' the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of 'victim' of crime and 'crimes of violence'").

[208] "Unlike previous versions of the proposed amendment, which permitted States to enforce the amendment in their jurisdictions, S.J.Res. 44 gives Congress exclusive power to 'enforce this article by appropriate legislation.' I believe that granting Congress sole power to enforce the provisions of the victims' rights amendment and thus, *inter alia*, to define terms such as 'victim' and 'violent crime' and to enforce the guarantees of 'reasonable notice' of public proceedings and of the rights established by the amendment will be a significant and troubling step towards federalization of crime and the nationalization of our criminal justice system. . . . It is possible that the victims' rights constitutional amendment will lack [the] flexibility that is the hallmark of our Federal system, and perhaps in the process invalidate many State victims' rights provisions. Such a prospect should give us pause," S.Rept. 105-409 at 44-5 (additional views of Sen. Hatch).

[209] "The majority appears to believe that it can control some of the inevitable damage through explications in the Committee report about how the amendment will operate. We doubt that the courts will care much for such efforts. They will look first at the plain meaning of the text of the amendment. They will seek guidance in Supreme Court precedents interpreting provisions using similar language. They will not resort to the majority report to interpret wording that is clearly understood in current legal and political circles. Any interpretative value of the majority report is further undermined by the inconsistency of the document, which in some situations narrows the impact of the amendment . . .

Proposals further described legislative authority by limiting the power to curtail the rights they explicitly established:

> *Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.*

This intriguing sentence has appeared in one form or another in several proposed amendments in the past.[210] In the evolution of the permissible restrictions, the first proposals granted the Congress and the states authority to "implement" in some instances,[211] "to enforce" in others,[212] and "to enforce" and create exceptions "for compelling reasons of public safety" in still others.[213] The diversity continued in the 105th Congress, when some of the proposed amendments vested the states and Congress (or simply the Congress) with authority to implement and enforce and some simply with the power to enforce; in either case, attendant authority to create exceptions–whether in the "public interest" or for "public safety or judicial efficiency" or in the name of a "compelling interest"–became more common.[214]

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and in other circumstances expands the impact of the amendment (*e.g.*, by devising a role for States in implementing the amendment . . .). Such inconsistency renders the majority report . . . legally meaningless. Weaknesses in the text of the amendment cannot with any confidence be cured by the majority's views, especially not when the majority's analysis is so directly at odds with the amendment's plain language and with settled constitutional doctrine.

* * *

"The majority report attempts to deflect the federalism concerns raised by S.J.Res. 44 by suggesting that the States will retain 'plenary authority' to implement the amendment within their own criminal systems. We find this suggestion surprising given the plain language of the amendment's implementation clause (in section 3): 'The Congress shall have the power to enforce this article by appropriate legislation.' Identical language in earlier constitutional amendments has been read to vest enforcement authority exclusively in the Congress. In the case of S.J.Res. 44, moreover, the text is illuminated by the legislative history. Earlier drafts of the amendment expressly extended enforcement authority to the states. These drafts drew fire from constitutional scholars, who expressed doubt that constitutionally-authorized State laws could be supreme over State constitutions or even over federal laws, and concern that, for the first time, rights secured by the Federal Constitution would mean different things in different parts of the country. The Committee then amended the text to its current formulation. Faced with this history and text, the courts will surely conclude that S.J.Res. 44 deprives States of any authority to legislate in the area of victims' rights," S.Rept. 105-409 at 50-1, 68-9 (minority views of Sens. Leahy, Kennedy and Kohl).

[210] S.J.Res. 65 (104th Cong.)("The Congress and the States shall have the power to enforce this article . . . by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety"); H.R.Res. 71 (105th Cong.)("The Congress and the States shall have the power to enforce this article . . . by appropriate legislation, including the power to enact exceptions when required by public interest"); S.J.Res. 6 (105th Cong.)("The Congress and the States shall have the power to enforce this article . . . by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases")(emphasis added).

[211] S.J.Res. 52 (104th Cong.) ("The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to implement further this article by appropriate legislation"); H.J.Res. 174 (104th Cong.)(same).

[212] H.J.Res. 173 (104th Cong.).

[213] S.J.Res. 65 (104th Cong.).

[214] S.J.Res. 6 ("The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases"); S.J.Res. 44 (as introduced) ("The Congress and the States shall have the power to implement and enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when necessary to achieve a compelling interest"); S.J.Res. 44 (as reported) ("The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest"); H.J.Res. 71 ("The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required by public safety"); H.J.Res. 129 ("Congress shall have the power to implement and enforce this article by appropriate legislation").

Proposals in the 106th brought uniformity. There were no references to state authority, gone was any express Congressional authority to "implement," only Congress' enforcement authority survived. Exceptions could be made but only for reasons of compelling interests.[215] Departure from the requirement of earlier versions that exceptions be "enacted," implied that exceptions might be crafted either legislatively or judicially.

The use of the term "compelling interest," on the other hand, suggested that the authority to create exceptions might be fairly limited. The Senate report on the version of S.J.Res. 44 where the language first appeared seemed to confirm both suggestions.[216] Although the report identified one unusual (courtroom attendance rights in a case with hundreds of victims)[217] and two commonplace situations (right to release notification in domestic and gang violence cases)[218] under which exceptions might be warranted, several Committee members found the "compelling interest" standard too restrictive.[219] The Justice Department raised the same objection.[220] Others might have questioned whether the standard's amorphous nature made it unsuitable.[221]

The relevant portions of the proposals in the 106th Congress declared:

> *A victim of a crime of violence, as those terms may be defined by law, shall have the rights* . . . . S.J.Res. 3 (106th Cong.).
>
> *The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.* H.J.Res. 64 (106th Cong.); S.J.Res. 3 (106th Cong.).

[215] S.J.Res. 3 ("The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest"); H.J.Res. 64 (same).

[216] S.Rept. 105-409 at 35 ("Courts interpreting the Crime Victims' Rights Amendment will no doubt give a similar, common sense construction to its provisions. To assist in providing necessary flexibility for handling unusual situations, the exceptions language in the amendment explicitly recognizes that in certain rare circumstances exceptions may need to be created to victims' rights").

[217] S.Rept. 105-409 at 36 ("in mass victim cases, there may be a need to provide certain limited exceptions to victims' rights. For instance, for a crime perpetrated against hundreds of victims, it may be impractical or even impossible to give all victims the right be physically present in the courtroom").

[218] *Id.* ("[I]n some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. . . [and] situations may arise involving inter-gang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence").

[219] S.Rept. 105-409 at 45 (additional views of Sen. Hatch) ("The compelling interest test is itself derived from existing constitutional jurisprudence, and is the highest level of scrutiny given a government act alleged to infringe on a constitutional right. The compelling interest test and its twin, strict scrutiny, are sometimes described as 'strict in theory but fatal in fact.' I truly question whether it is wise to command through constitutional text the application of such a high standard to all future facts and circumstances"); *Id.* at 75 (minority views of Sens. Leahy, Kennedy and Kohl).

[220] *House Hearing III* (prepared statement of Assistant Attorney General Eleanor D. Acheson)("We believe that the authority to create exceptions should exist where necessary to promote a 'significant' government interest, rather than the 'compelling' interest required by the current resolution").

[221] See e.g., *Vernonia School District v. Acton*, 515 U.S. 646, 661 (1995)("It is a mistake, however, to think that the phrase 'compelling state interest,' in the Fourth Amendment context, describes a fixed minimum quantum of governmental concern, so that one can dispose of a case by answering in insolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears important enough to justify the particular search at hand in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy"); *Wilcher v. City of Wilmington*, 139 F.3d 366, 377 (3d Cir. 1998)("'compelling interest' does not have the same meaning in [a Fourth Amendment] context as it does in other areas of constitutional law").

Amendment in the 108th Congress

> *SECTION 4. Congress shall have the power to enforce by appropriate legislation this article. . . .*
>
> *SECTION 2. . . . These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.*

In the 108th, some uniformity continues, the states are not mentioned, Congress enjoys explicit legislative authority to enact enforcement mechanisms (but not to make implementing fixes), but the number of exceptions has grown to include public safety, the administration of criminal justice, and compelling necessity. Although, the phrases "substantial interest", "public safety", "administration of criminal justice", and "compelling necessity" probably cannot be considered terms of art, they appear with varying degrees of regularity in statute and case law.

"Substantial interest" surfaces perhaps most frequently in the application of the *Central Hudson* test. The regulation of commercial speech is subject to an intermediate level of First Amendment scrutiny under a four part standard initially articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 569 (1980)(emphasis added): "At the outset, we must determine whether the expression is protected by the First Amendment. . . . *Next, we ask whether the asserted governmental interest is substantial*. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[222] One Congressional witness has asserted that "substantial interest" as used in the Amendment is intended to incorporate the third and fourth prongs of the *Central Hudson* test, *i.e.*, that the government must not only demonstrate a substantial interest but show how its action furthers that interest and that its action is no more intrusive than necessary to protect the interest:

> The 'substantial interest' standard is known in constitutional jurisprudence [*E.g., Central Hudson Gas & Ele. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). ('The state must assert a *substantial interest* to be achieved by commercial speech. Moreover, the regulatory technique must be in proportion to that interest.' *Id.* At 564. The interest must be clearly articulated and then closely examined to determine whether it is substantial. The Court's analysis at 569 is instructive on this point)] and is intended to be high enough so that only 'essential' [Webster's New Collegiate Dictionary, 1161 (1977)('Substantial . . . 1 a: consisting of or relating to substance b: not imaginary or illusory: REAL, TRUE c: IMPORTANT, ESSENTIAL. . . .'] interests in public safety and the administration of justice will qualify as justifications for restrictions of the enumerated rights. *Senate Hearing V*; *House Hearing V* at 46 (statement of Steven T. Twist)(capitalization in the original; footnotes of the original in brackets); see also, *Senate Hearing IV* at 197; *House Hearing IV* at 28.

The concept of "public safety" may be a bit more amorphous. The Constitution itself refers to public safety in the suspension clause ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the *public safety* may require it," U.S.Const. Art.I, §9, cl.2 (emphasis added)). In a broader sense, the phrase may refer to the basis under which the states may validly exercise their police powers,[223] or to "the welfare and

[222] *See also, Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 183 (1999); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000).

[223] *E.g., Nollan v. California Coastal Comm'n*, 483 U.S. 837 (1987).

protection of the general public."[224] The Supreme Court has recognized a "public safety exception" to the *Miranda* rule which permits admissibility of the statements of defendant in custody notwithstanding the absence of *Miranda* warnings when the statements were elicited in the interest of public safety.[225] A more recent observation declared that "[w]here publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to *public safety*."[226]

There may be some question whether exceptions may be drawn to protect a single individual when no one else in threatened or to render safe areas from which the general public is ordinarily excluded (*e.g.*, prisons). One congressional witness has espoused such a broad application:

> In discussing the compelling interest standard of S.J.Res. 3, the Senate Judiciary Report noted, 'In cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This [provision] offers the ability to do just that . . . . [Moreover] situations may arise involving intergang violence, where notifying the member of a rival gang of an offender's impending release may spawn retaliatory violence. Again, this provision provides a basis for dealing with such situations.'
>
> 'Public safety' as used here includes the safety of the public generally, as well as the safety of identified individuals. [See *Bartnicki v. Vopper*, 532 U.S 514 (2001)(where a 'public safety' threat was to identified school board members]. *Senate Hearing V; House Hearing V* at 46 (statement of Steven T. Twist); see also, *Senate Hearing IV* at 198; *House Hearing IV* at 28.

The outer limits of the term "administration of criminal justice" seem even more uncertain. The Supreme Court apparently understands the "administration of criminal justice" to describe judicial proceedings associated with the trial of criminal offenses, whether the phrase contemplates official activities ancillary to those proceedings is less clear.[227] One witness in the hearings translated the term to mean "the procedural functioning of the [criminal trial]

[224] BLACK'S LAW DICTIONARY 1245 (7th ed. 1999).

[225] *E.g.*, response of an arrested suspect, wearing an empty holster, to the query, "where's the gun," *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

[226] *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001)(Breyer & O'Connor, JJ., concurring) (emphasis added).

[227] *Ohler v. United States*, 529 U.S. 753, 759-60 (2000)("it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify [at his criminal trial]"); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 354 (1994)("The so-called *McNabb-Mallory* rule, adopted by this Court in the exercise of its supervisory authority over the administration of criminal justice in federal courts"); *Butterworth v. Smith*, 494 U.S. 624, 629 (1990)("Historically, the grand jury has served an important role in the administration of criminal justice"); *Miranda v. Arizona*, 384 U.S. 436, 480 (1966("An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. . . . In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution").

proceeding."[228] Another voiced concern over the impact on prison administration of such a narrow reading.[229]

The Court has used the term "compelling necessity" in two environments: (1) to describe the burden a party must bear when seeking disclosure of grand jury information, *i.e.*, "particularized need;"[230] and (2) to describe the burden the government must bear to justify regulatory intrusion upon a fundamental constitutional right, *i.e.,* "compelling interest."[231] In either case, the "compelling necessity" standard may be less burdensome than the "substantial interest" standard that attaches to public safety restrictions and perhaps to restrictions in the name of the administration of criminal justice ("These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity").[232]

When interpreting the Amendment, courts might favor the compelling interest option because it alludes to a governmental burden while particularized need is a burden ordinarily shouldered by a private party. On the other hand, the frequent use of "compelling interest" in earlier proposed amendments may indicate that the drafters switched to "compelling necessity" with a different

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[228] "*the administration of criminal justice* [-] It is intended that the language will address management issues within the courtroom or logistical issues arising when it would otherwise be impossible to provide a right otherwise guaranteed. In cases involving a massive number of victims notice of public proceedings may need to be given by other means, courtrooms may not be large enough to accommodate every victim's interest, and the right to be heard may have to be exercised through other forms. The phrase is not intended to address issues related to the protection of defendants' rights. "The term 'administration of criminal justice,' as used by the United States Supreme Court is a catch-all phrase that encompasses any aspect of criminal procedure. The term 'administration' includes two components: (1) the procedural functioning of the proceeding and (2) the substantive interest of parties in the proceeding. The term 'administration' in the Amendment is narrower than the broad usage of it in Supreme Court case-law and refers to the first description: the procedural functioning of the proceeding. Among the many definitions available for the term 'administration' in Webster's Third International Dictionary of the English Language (1971), the most appropriate definition to describe the term as used in the Amendment is: 12b. Performance of executive [prosecutorial and judicial] duties: management, direction, superintendence.' (Brackets added)," *Senate Hearing V*; *House Hearing IV* at 47 (statement of Steven T. Twist); see also, *Senate Hearing IV* at 198-99; *House Hearing IV* at 28 (statement of Steven T. Twist).

[229] "[T]he current bill improves upon its predecessor by expanding on the 'compelling interest' standard for exceptions. However, if courts do not interpret 'the administration of criminal justice' broadly, the legitimate needs of prison administration might nevertheless be sacrificed. Although I would likely disagree with an interpretation of the phrase that excluded prison administration, such an interpretation is certainly possible. Given that habeas corpus proceedings challenging the treatment of prisoners are treated as civil cases and are collateral to the underlying criminal prosecutions, it would not be unreasonable for a court to conclude that the needs of prison administrators are not included within the phrase 'administration of criminal justice'. . . ." *Senate Hearing V; House Hearing V* at 78 (statement of James Orenstein); see also, *Senate Hearing IV* at121; *House Hearing IV* at 49 (statement of James Orenstein).

[230] *United States v. Procter & Gamble Co*., 356 U.S. 677, 682 (1958)(emphasis added)("This indispensable secrecy of grand jury proceedings must not be broken except where there is a *compelling necessity*"); *cf., Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 217-24 (1979).

[231] *Riley v. National Federation of the Blind*, 487 U.S. 781, 800 (1988)(emphasis added)("These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent *compelling necessity*, and then, only by means precisely tailored");*Plyler v. Doe*, 457 U.S. 202, 224 (1982)(emphasis added ("Nor is education a fundamental right; a State need not justify by *compelling necessity* every variation in the manner in which education is provided to its population").

[232] The Amendment's use of "substantial interest" is also somewhat ambiguous. Are restrictions permitted when dictated by the administration of criminal justice or by a substantial interest in public safety or must the administration of criminal justice interest be substantial as well. The more logical construction would seem to apply the "substantial interest" measure to both public safety and the administration of criminal justice, but a contrary construction would not be unreasonable.

standard in mind. House witnesses felt "compelling necessity" called for a demanding "strict scrutiny" standard.[233]

The Senate Judiciary Committee report in the 108th Congress briefly explains its understanding of the restrictions clause. It expects recourse to the clause will occur only rarely and supplies three examples of when the clause might be called upon – in the case of crimes with catastrophic consequences ("mass victim cases"); in domestic violence cases; and in cases of "inter-gang violence," S.Rept. 108-191 at 41.

Many of the Amendment's rights are subject to a rule of reasonableness that seems to afford flexibility in mass victim cases. There is, however, no such explicit limitation upon the right not to be excluded, and it is here that the Committee believes the restriction clause might come into play.[234] The Committee is comparably precise in its observation that the clause might be invoked "where notifying the member of a rival gang of an offenders' impeding release may spawn retaliatory violence," *id.* The gang example may serve the added purpose of clarifying the scope of the Amendment's right to reasonable and timely notice of the release or escape of an accused. When the Committee identifies gang retaliation as an example of where the restriction clause may prove beneficial, it suggests that otherwise concern for offender safety may not be considered in formulating and implementing reasonable victim notification procedures.

This has obvious implications in a domestic violence situation and may be what the Committee had in mind when it offered the domestic violence example. Yet, the report is cryptic as to when the use of the restrictions clause might be appropriate or necessary in a domestic violence case. It simply declares that, "in some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions," *id.* The report does confirm the Committee's understanding of the clause's use of the terms "substantial interest" and "compelling necessity," refers to the standards developed by the Supreme Court, with the added observation "that defendants' constitutional rights may well meet this standard in many cases," S.Rept. 108-191 at 41-2.

The restriction clause mentions neither Congress nor the states. Earlier versions spoke of state authority in the area. The omission might be considered telling, or it may be that such a construction is too wildly impractical to have been intended. It may be that the restrictions clause may only be activated by Congress acting pursuant to the enforcement authority the Amendment confers in section 4. Perhaps, in the absence of a statute no restriction may be found. On the other hand, the Committee report begins its discussion of the restrictions clause by noting that the First Amendment not absolute and that "[c]ourts interpreting the Crime Victims' Rights Amendment will no doubt give a similar common sense construction to its provisions," S.Rept. 108-191 at 41. The implication is that the courts, in most instances at least initially the state courts, will be the ones to determine whether the circumstances in a particular case warrant the application of the restrictions clause.

[233] "[P]rison-related restrictions of victims' rights must therefore pass strict scrutiny under the compelling necessity prong of Section 2," *Senate Hearing V; House Hearing V* at 78 (statement of James Orenstein); see also, *Senate Hearing IV* at121; *House Hearing IV* at 49 (statement of James Orenstein).

[234] "[F]or a crime perpetrated against hundreds of victims, it may be impractical or even impossible to give all victims the right to be physically present in the courtroom. In such circumstances, an exception to the right to be present may be made, while at the same time providing reasonable accommodation for the interest of victims. Congress, for example, has specified a close-circuit broadcasting arrangement that may be applicable to some such cases," S.Rept. 108-191 at 41.

Enforcement

Section 4 of the Amendment empowers Congress to enact legislation to facilitate its enforcement. Section 3 insists that only victims and their representatives may seek to enforce rights under the Amendment; those accused of the crime may not. The relief available may not include a claim for damages or the right to have completed trials reopened to vindicate victims' rights. Other sections color the relief available by circumscribing the Amendment's right to notice and to be heard with a rule of reason and by allowing federal – and possibly state – executive, legislative and judicial branches to restrict victim's rights in the face of substantial interests in public safety or the administration of criminal justice or when faced with compelling necessity. The history of the Amendment raises some question of the extent to which indigent victims would be entitled to the assistance of appointed counsel to assert their rights.

Contemporary Practices

Most victims' rights statutes and state constitutional amendments limit the means available to enforce them. No jurisdiction seems to have outlawed the failure to afford victims' rights. The denial of a victim's rights does not appear to expose any official to criminal liability.[235] Moreover, officials commonly enjoy immunity from civil liability, either directly or by provisions that deny that the victim's rights give rise to a cause of action for their enforcement.[236] Even without these no-cause-of-action clauses, many victims' rights edicts expressly preclude revisiting decisions in the criminal justice system in order to correct a denial of victims' rights or have other provisions designed to prevent offenders from claiming the benefits of victims' rights.[237]

In contrast, federal law exposes those who violate rights guaranteed by the United States Constitution to both criminal and civil liability.[238]

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[235] At least initially, *see*, S.C.CONST. Art.I §24(B) ("The rights created in this section may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services contained in this section, and a wilful failure to comply with a writ of mandamus is punishable as contempt").

[236] *E.g.*, IDAHO CONST. Art.I, §22 ("Nothing in this section shall be . . . construed as creating a cause of action for money damages, costs or attorney fees against the state, a county, a municipality, any agency, instrumentality or person"); MD.CONST. *Bill of Rights*, §47(b)("Nothing in this article permits any cause of action for monetary damages for violation of any of its provisions . . ."); 42 U.S.C. 10606(c)("This section does not create a cause of action or defense in favor of any person arising out the failure to accord to a victim the rights enumerated in subsection (b) of this section").

[237] *E.g.*, OHIO CONST. Art.I §10A ("This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding"); ARIZ.CONST. Art.2, §2.1(C)("'Victim' means a person . . . except if the person is in custody for an offense or is the accused").

[238] 18 U.S.C. 242 ("Whoever, under color of any law . . . willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than ten years, or both . . ."); *United States v. Lanier*, 520 U.S. 259 (1997); 42 U.S.C. 1983 ("Every person who, under color of any statute . . . of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . .").

Past Proposals

Historically the enforcement sections of proposals to amend the Constitution have had at least four features. First, they grant victims standing to assert their rights. Second, they deny defendant's prerogative of claiming the rights of victims. Third, as discussed above, they grant Congress and/or the state legislatures the authority to enact enforcement legislation. Fourth, they have limited the enforcement options available to victims in the absence of legislation, and arguably limited the legislative authority to craft enforcement mechanisms. They have included no-cause-of-action clauses, clauses banning review of judicial decisions, and clauses limiting who might call for enforcement.[239] Proposals in the 106th Congress were similar to predecessors, but opened the door for victims to revisit judicial determinations concerning restitution and bail or other forms of conditional release:

> *Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article without staying or continuing a trial. Nothing in this article shall give rise to a claim for damages against the United States, a State, a political subdivision, or a public official*. H.J.Res. 64 (106th Cong.); S.J.Res. 3 (106th Cong.).

The Senate Judiciary Committee anticipated that allowing victims to challenge decisions concerning bail, restitution, and future proceedings would pose no unacceptable threat to the finality of criminal proceedings (unlike the prerogative to an order to reopen, stay, or grant a continuance of a trial), S.Rept. 106-254 at 40. The Department of Justice, however, objected to the prospect of a want of finality in restitution cases,[240] and some members of the Committee had earlier expressed concern over the provision's operation in bail cases.[241]

The Committee likewise anticipated that the no-damages clause would "prevent the possibility that the proposal might be construed by courts as requiring the appointment of counsel at State expense to assist victims, *Cf., Gideon v. Wainwright*, 372 U.S. 335 (1963)(requiring counsel for indigent criminal defendants)," S.Rept. 106-254 at 41.[242] The Committee's observation is significant because without it the courts might easily reach the opposite conclusion. Without it, the evidence seems to bespeak an intent to supply indigents with a legal representative at public expense. The Committee's citation to *Gideon* appears designed to point out that without the

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[239] *E.g.*, S.J.Res. 65 (104th Cong.)("The victim shall have standing to assert the rights established by this article; however, nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial; nor shall anything in this article give rise to a claim for damages against the United States, a State, a political subdivision, or a public official; nor shall anything in this article provide grounds for the accused or convicted offender to obtain any form of relief"); *see also*, H.J.Res. 71 (105th Cong.).

[240] 146 *Cong.Rec.* S2998 (daily ed. April 27, 2000)(letter from Ass't Att'y Gen. Robert Raben to Senate Majority Leader Trent Lott)("The current language would appear to permit a victim to reopen the restitution portion of a sentence for any reason at all, at any time, even after a sentence has been served in full. The problems for law enforcement that could be caused by this provision include, for example, the possibility that because of the limited economic means of many defendants, restitution awarded to some victims at sentencing might have to be decreased to accommodate subsequent claims by victims who come forward after sentencing; the potential that defendants will litigate the reopening of a restitution order without the reopening of other parts of the sentence; and the difficulty in reaching and defending plea agreements in light of possible reopenings of and changes in terms of restitution").

[241] S.Rept. 105-409 at 44 (additional views of Senator Hatch)("serious reconsideration should be given to whether it is wise to include in the amendment the right of victims to unilaterally seek to overturn release decisions after the fact").

[242] Several Committee members questioned whether the language would be so construed, *Id.* at 71 (minority views of Sens. Leahy, Kennedy, Kohl, and Feingold). A few state constitutional amendments expressly disclaim any intention to create a right to appointed counsel, *e.g.*, WASH. CONST. Art.I §35.

limitation victims, like the accused, would be entitled to the assistance of counsel during proceedings related to the crime.[243] Without the observation, the due process and equal protection clauses might seem to require the appointment of counsel for indigent victims. Even the presence of the damage claim limitation alone might have been considered insufficient, since attorneys' fees are not ordinarily considered an element of damages.[244] Moreover, if an egalitarian right to representation were embedded in the victims' rights amendment it could be enforced by invoking the injunctive or other equitable powers of the courts. This would be so even though the prospect of damages (with or without attorneys' fees) had been foreclosed. On the other hand, only a few of the states have seen the necessity to explicitly announce that their comparable victims' rights laws do not include the right to appointed counsel.[245]

Recall the proposals of the 106th Congress:

> *Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article without staying or continuing a trial. Nothing in this article shall give rise to a claim for damages against the United States, a State, a political subdivision, or a public official*. H.J.Res. 64 (106th Cong.); S.J.Res. 3 (106th Cong.).

Amendment in the 108th Congress

> *SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.*

The Amendment is clearly not the same as its antecedent in the 106th Congress. It does continue to preclude new trials as an enforcement mechanism. It has replaced a ban on causes of action for damages with a ban on claims for damages. Although any right to recover damages against the United States is often referred to as a claim rather than a cause of action, the courts seem unlikely to construe the change as one which exposes all but the United States to an action for damages without a more explicit indication of such an intent.[246] The preservation of the damage ban may

[243] *Gideon* held that the Fourteenth Amendment's due process clause precludes treatment of the Sixth Amendment right to the assistance of counsel as a white collar privilege available only to men of means, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man changed with crime has to face his accusers without a lawyer to assist him. . . . [For the] right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," 372 U.S. at 344-45.

[244] *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Bausch & Lomb Inc. v. Utica Mutual Ins. Co.*, 355 Md. 566, 590, 735 A.2d 1081, 1094 (1999); *Woollen v. State*, 256 Neb. 865, 887, 593 N.W.2d 729, 744 (1999).

[245] *E.g.*, IDAHO CONST. art.I, §22 ("Nothing in this section shall . . . be construed as creating a cause of action for money damages, costs or attorney fees against the state. . ."); LA.CONST. art. I, §25 ("Nothing in this section shall be the basis for an award of costs or attorney fees, for the appointment of counsel for a victim, or for any cause of action for compensation . . .").

[246] The generality of the commentary thus far belies such an intent, see *e.g.*, *Senate Hearing V; House Hearing V* at 48 (statement of Steven J. Twist)(emphasis in the original) ("*Nothing in this article shall be construed to provide grounds for a new trial [or] to authorize any claim for damages [–]* The proposed language in no way limits the power to *enforce* the rights granted. Rather it provides two narrowly tailored exceptions to the *remedies* that might otherwise be available in an enforcement action. The language creates the limitations as a matter of constitutional interpretation"); see also, *Senate Hearing IV* at 199-200; *House Hearing IV* at 29. Note that some of the past resolutions barred

be considered sufficient to bring with it the construction suggested for earlier bans to the effect that they contained within them a proscription against requiring the appointment of counsel to assist victims to claim their rights.[247]

Gone from the Amendment is the previous repudiation of "grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling." The Amendment precludes new trials and damage claims, but on its face seems to allow the courts to entertain victims' petitions to enforce their rights in virtually any other context.[248] At least one witness expressed reservations on this very ground.[249] Other sections of the Amendment, however, may alleviate these concerns.

Section 4 gives Congress the power to enact enforcement legislation. Comparable powers have been said in the past to reside in the states.[250] Section 2 may supply either an alternative or supplemental basis for limiting victim's remedies to retrospective relief. It bars legislation or judicial action in derogation of the rights that the Amendment creates "*except* when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice,

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"claim[s] for damages against the United States, a state, a political subdivision, or a public officer or employee," *e.g.*, H.J.Res. 64 (106th Cong.).

[247] S.Rept. 108-191 at 42 ("The limiting language in the provision also prevents the possibility that the amendment might be construed by courts as requiring the appointment of counsel at State expense to assist victims"). But see, S.Rept. 108-191 at 81 (minority views)("We fail to see how a limitation on the remedies available for government violations of victims' rights could even remotely affect a court's determination regarding the government's duty to assist indigent victims in exercising those rights. This is especially so in light of the majority's acknowledgment that 'every state is required under the sixth amendment * * * to provide legal counsel to indigent defendants and that victims are entitled to equal treatment"); *Senate Hearing V; House Hearing V* at 48 (statement of Steven J. Twist)("It is intended that both the word 'victim' and the phrase 'victim's lawful representative' will be the subject of statutory definition by the state legislature and the Congress, within their respective jurisdictions. . . . In the absence of a statutory definition the courts would be free . . . to use [their] power to appoint appropriate lawful representatives"); see also *Senate Hearing IV* at 200; *House Hearing IV* at 29. Past treatment of the phrase "lawful representative" suggests that some construe it to include both representatives who speak on behalf of children or the incapacitated as well as attorneys and oftlineother representatives for competent individual victims or perhaps for victims as a class: "There will be circumstances in which victims find it desirable to have a representative assert their rights or make statements on their behalf. This provision recognizes the right of a competent victim to choose a representative to exercise his or her rights . . . Other 'lawful representatives' will exist in the context of victims who are deceased, are children, or are otherwise incapacitated," S.Rept. 106-254 at 39; S.Rept. 105-409 at 33.

[248] *Senate Hearing IV; House Hearing IV* at 29 (statement of Steven J. Twist)(emphasis in the original)("The proposed language in no way limits the power to *enforce* the rights granted. Rather it provides two narrowly tailored exceptions [new trial and damages] to the *remedies* that might otherwise be available in an enforcement action").

[249] "[I]f a victim were improperly excluded from a courtroom during the consideration of a motion in limine to exclude evidence, it would make more sense to allow the victim to obtain appellate relief in the form of a prospective order to admit the victim to future proceedings than a retrospective one that would vacate the evidentiary ruling so that the matter could be re-argued in the victim's presence. Moreover, it would plainly be contrary to the interest of effective law enforcement if a victim could obtain a stay or continuance of trial while the interlocutory appeal of [the exclusion] described above was pending. The remedies language of S.J.Res. 3 [106th Cong.] inelegant as it was, would have prevented such anomalous results. The more streamlined language of the current bill – by deleting the prohibitions against staying or continuing trials, reopening proceedings, and invalidating ruling[s] – would not," *Senate Hearing V; House Hearing V* at 81(statement of James Orenstein); see also, *Senate Hearing IV* at 125; *House Hearing IV* at 52.

[250] "Congress' power to 'enforce' established by this section carries limitations that are important for [the] principles of federalism. The power to enforce is not the power to define. As the Senate Judiciary Report noted, 'This provision is similar to existing language found in section 5 of the 14th Amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to enforce the rights, that is, to ensure that the rights conveyed by the Amendment are in fact respected. At the same time, consistent with the plain language of the provision, the federal government and the states will retain their power to implement the Amendment. For example, the states will, subject to Supreme Court review, flesh out the contours of the Amendment by providing definitions of victims of crime and crimes of violence,'" *Senate Hearing IV; House Hearing IV* at 29 (statement of Steven J. Twist), quoting S.Rept. 106-254 at 41; S.Rept. 105-409 at 35.

or by compelling necessity." Refusing to reopen completed judicial proceedings or to entertain disruptive interlocutory appeals may be precisely the kind of exception in the name of the substantial interests in the administration of criminal response that the section envisions.

Moreover, Section 2 is often more circumspect in the rights it grants than were some of the past proposals. Section 2 cabins the right to heard under a rule of reasonableness ("the right[] . . . reasonably to be heard at . . . proceedings'), where once no such express limitation could be found. Victims could once have anticipated the promise of "right [] to an order of restitution" and of the opportunity to contest after the fact any failure to honor that right, H.J.Res. 64/S.J.Res. 3 (106th Cong.). The authors of the Amendment's Section 2 decide instead to offer victims "adjudicative decisions that duly consider [their] . . . interest in just and *timely* claims to restitution." The concern expressed by the Department of Justice in connection with proposals in the 106th seems have been addressed by the change.

Section 3 of the Amendment has another modification of interest. It words negatively the clause that once granted victim standing: "Only the victim or the victim's lawful representative may assert the rights established by this article." This has been characterized as a grant of victim standing,[251] but it seems to say more. First coupled with the clause that follows ("no person accused of the crime may obtain any form of relief hereunder"), it appears to bar defendants (unless they are also victims) from claiming the Amendment as either a sword or shield. Second, it makes it difficult for the government to claim the Amendment on behalf of victims, or at least on behalf of individual victims. Third, it implies a right to have a lawful representative, and perhaps by operation of the equal protection clauses of the Fifth and Fourteenth Amendments, for indigent victims to have a representative appointed.[252]

The final clause in Section 3 declares that, "no person accused of the crime may obtain any form of relief hereunder." This seems to mean an individual may not claim the rights of one whom he victimizes. The presence of the term "the crime," however, indicates that an individual may be entitled to the Amendment's benefits as victim of one crime notwithstanding the fact that he or she has been accused or convicted of a different offense.

References to "a person accused of the crime" rather than "the offender" raises the question of whether the ban (on an accused obtaining any form of relief under the Amendment) disappears upon conviction when the offender is no longer the accused. But a person accused of the crime and subsequently either convicted or acquitted may still accurately be described as "the accused," yet the individual may still accurately be described as "the person accused." The first is a statement of current status; the second a statement of historical fact. Later courts, however, may conclude that the distinction was not intended.

Effective Date

The Amendment goes into effect 180 days after ratification by the states. There is some question whether the Amendment applies to all proceedings and decisions occurring after the effective date or only to those involving crimes occurring after the effective date.

[251] "With the adoption of this clause there will be no question that victims have standing to assert the rights established," *Senate Hearing IV; House Hearings IV* at 29 (statement of Steven J. Twist).

[252] "There will be circumstances in which victims find it desirable to have a representative assert their rights on their behalf. This provision recognizes the right of a competent victim to choose a representative to exercise his or her rights, as provided by law," S.Rept. 108-191 at 43; S.Rept. 106-254 at 39; S.Rept. 105-409 at 33.

Contemporary Practices

Constitutional amendments become effective upon ratification by three-fourths of the states, U.S.Const. Art. V. The Constitution does not mention any period of time within which three-fourths of the states must ratify, but most proposed amendments insist upon ratification within seven years. Like any other provision, the constitutional provisions for ratification are subject to amendment. Proposed amendments not infrequently include a delayed effective date in order to allow for the passage of implementing legislation.

Past Proposals

The first victims' rights proposals called for ratification within seven years as part of their enacting clauses.[253] One made it expressly applicable to all proceedings subsequent to ratification rather than to proceedings relating to crimes committed after ratification, S.J.Res. 65 (104th Cong.)("The rights established by this article shall be applicable to all proceedings occurring after the ratification of this article"). Each successive proposal brought these two elements with it (seven year ratification and application to proceedings rather than to crimes occurring after ratification). They each added a third element, a 180 day delayed effective date.[254]

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intends and purposes as part of the constitution when ratified by the legislatures of three-fourths of the several States, within seven years from the date of its submission by the Congress.*
>
> *SECTION 4. This article shall take effect on the 180th day after ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.*

Amendment in the 108th Congress

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following*

[253] H.J.Res. 173 ("*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intends and purposes as part of the constitution when ratified by the legislature of three-fourths of the several States within seven years after the date of its submission for ratification"); H.J.Res. 174; S.J.Res. 52; S.J.Res. 65, each of the 104th Congress.

[254] *E.g.*, H.J.Res. 64 (106th Cong.)("This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article"). The Senate Judiciary Committee's somewhat cryptic explanation for the special treatment of restitution orders points to the split of authority over whether the ex post facto clauses preclude retroactive restitution adjustments, S.Rept. 105-409 at 36; S.Rept. 106-254 at 42 ("A few courts have held that retroactive application of changes in standards governing restitution violates the Constitution's prohibition of ex post facto laws. *E.g., United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997). The Committee agrees with those courts that have taken the contrary view that, because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. *E.g., United States v. Newman*, [144 F.3d 531] (7th Cir. 1998). However, to avoid slowing down the conclusion of cases pending at the time of the amendment's ratification, the language on restitution orders was added"). Without the added language, courts might have to stop to consider whether the victims' rights Amendment superseded any ex post facto limitation on the application of the Amendment's restitution provisions. Some may find an equally weighty argument in the fact that but for the limitation every pre-Amendment conviction in the nation would be ripe for revisitation under section 2 of the Amendment. ("Nothing in this article shall provide grounds to . . . reopen any proceeding or invalidate any ruling, except with respect to . . . restitution. . .").

> *article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intends and purposes as part of the constitution when ratified by the legislatures of three-fourths of the several States, and which shall take effect on the 180th day after ratification of this article*.[255]
>
> *SECTION 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification*.[256]

The House and Senate revisions of the Amendment differ only in that the House includes its effective provision in the enacting clause and the Senate places it section 5. It seems a distinction without a difference. Substantively, the 180 day effective date no longer carries the restitution order exception found in some of the earlier proposals. The special exception may have been thought unnecessary after the timeless and unqualified right to a restitution order was abandoned in favor of a right to due consideration of timely and just restitution claims.

On the other hand, past proposals and their accompanying legislative history made it clear that the Amendment applied to proceedings related to crimes occurring after its effective date.[257] Courts may take special note of the Amendment's departure from that history, for the change seems to suggest that it is the date of the proceedings and not the date of the victimizing crime that is critical now. The Senate Judiciary Committee apparently concurs for it goes out its way to document its agreement with the courts that have found no ex post facto impediment to the retroactive application of restitution liability changes.[258] The difficulties associated with notification rights of the victims of crimes committed decades ago could be considerable.

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[255] The language underlined above appears only in H.J.Res. 10.

[256] The language underlined above appears only in S.J.Res. 1.

[257] "The Committee has included a 180-day 'grace period' for the amendment to allow all affected jurisdictions ample opportunity to prepare to implement the amendment. After the period has elapsed, the amendment will apply to all crimes and proceedings thereafter," S.Rept. 106-254 at 42; S.Rept. 105-409 at 36.

[258] S.Rept. 108-191, at 44 ("After the [180 day grace] period has elapsed, the amendment will apply to all crimes and proceedings thereafter. A few courts have held that retroactive application of changes in standards governing restitution violates the Constitution's prohibition of ex post facto laws. See, e.g., *United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997). The Committee agrees with those courts that have taken the contrary view that, because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. See, e.g., *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998) "). Of course, following ratification, courts of the *Williams* persuasion might conclude that amendment eliminates any conflicting ex post facto impediments that might otherwise exist.

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